

***United States Court of Appeals
for the Second Circuit***



APPENDIX

NO. 75-4202

United States Court of Appeals FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

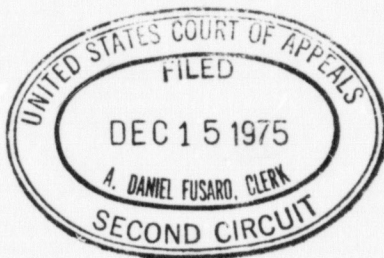
v.

ZIM TEXTILE CORPORATION,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

APPENDIX



ELLIOTT MOORE
Deputy Associate General Counsel,
National Labor Relations Board,
Washington, D.C. 20570

PAGINATION AS IN ORIGINAL COPY

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ZIM TEXTILE CORPORATION,

Respondent.

No. 75-4202

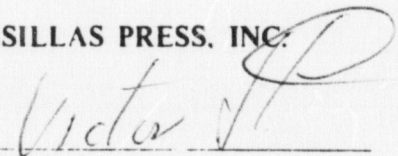
CERTIFICATE OF SERVICE

I hereby certify that I have served by hand (by mail) two copies of the
APPENDIX in the above-entitled case, on
the following counsel of record, this 21 day of November 1975.

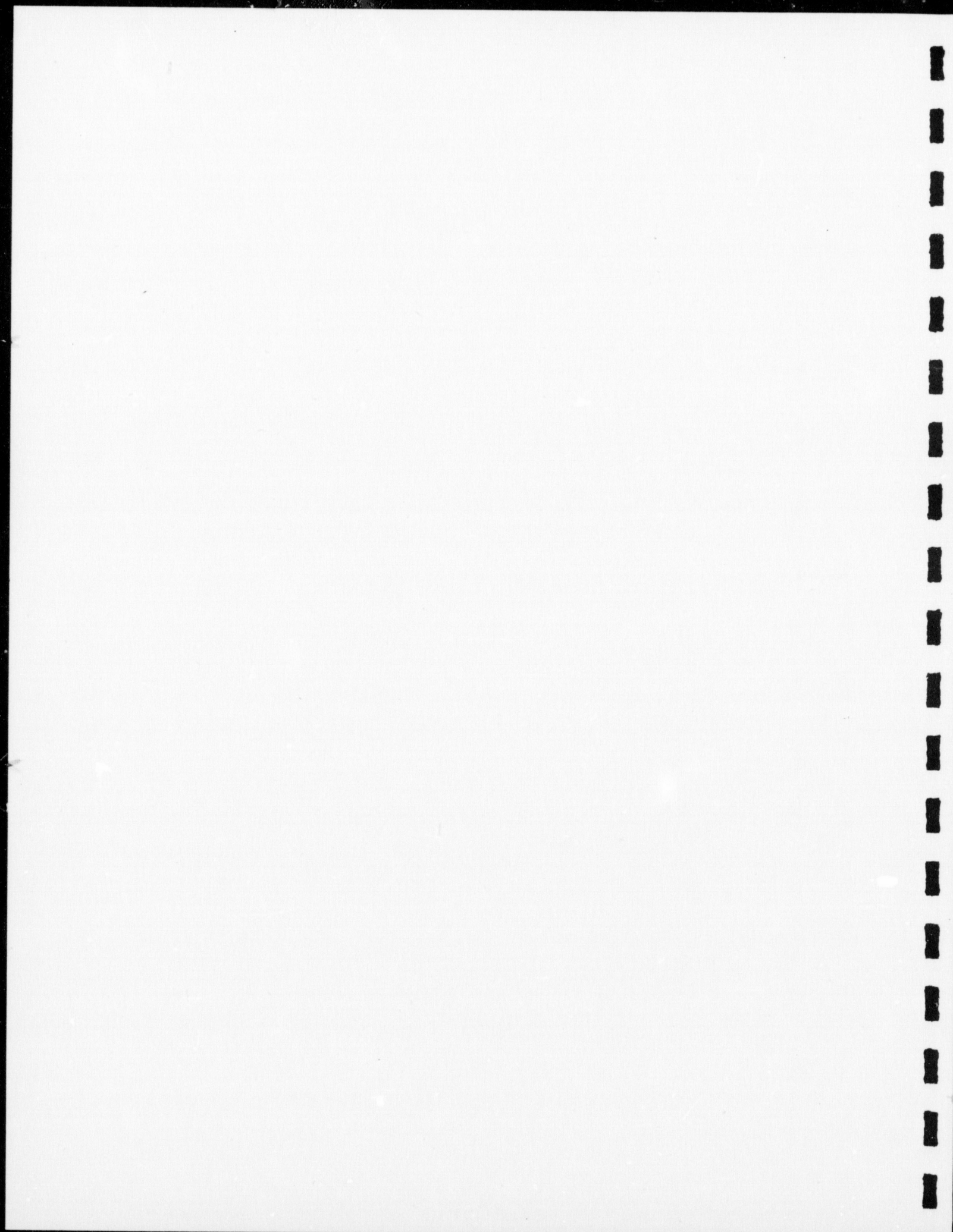
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Subscribed and Sworn to before me this



(i)

INDEX

	<u>Page</u>	
CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES	1	
DECISION OF THE ADMINISTRATIVE LAW JUDGE	3	
EXCEPTIONS OF RESPONDENT ZIM TEXTILE CORP. TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE	36	
BOARD'S DECISION AND ORDER	48	
GENERAL COUNSEL'S EXHIBIT NO. 1	56	
GENERAL COUNSEL'S EXHIBIT NO. 2A/B	71	
GENERAL COUNSEL'S EXHIBIT NO. 3	72	
GENERAL COUNSEL'S EXHIBIT NO. 4	73	
GENERAL COUNSEL'S EXHIBIT NO. 5	77	
RESPONDENT'S EXHIBIT NO. 1A	80	
RESPONDENT'S EXHIBIT NO. 1B	81	
RESPONDENT'S EXHIBIT NO. 2A	82	
RESPONDENT'S EXHIBIT NO. 2B	83	
RESPONDENT'S EXHIBIT NO. 3	85	
EXCERPTS FROM TRANSCRIPTS OF PROCEEDINGS	91	
	<u>Tr.</u> <u>Page</u>	<u>App.</u> <u>Page</u>
Witnesses:		
Israel Colon		
Direct	25	96
Cross	50	106
Nelson Vega		
Direct	61	110
Cross	74	116
Ralph Passman		
Direct	83	119
Cross	93	123

(ii)

	<u>Tr.</u> <u>Page</u>	<u>App.</u> <u>Page</u>
Ralph Passman (Continued)		
Redirect	101	127
Martin Zell		
Direct	115	129
Cross	208	143

APPENDIX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

ZIM TEXTILE CORP.,

Respondent

and

DISTRICT 65, DISTRIBUTIVE
WORKERS OF AMERICA,

Charging Party

Case 2 -CA -13304

Thomas T. Trunkes, Esq., of
New York, N. Y., for the
General Counsel.

Milton Horowitz, Esq., of
New York, N. Y., for the
respondent.

Messrs. Ralph Passman and
Edward Pagan, for the
Charging Party.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: Zim Textile Corp.

Case No.: 2-CA-13304

- 5. 6.74 Charge filed
- 5.10.74 First Amended Charge, filed
- 6. 6.74 Complaint and Notice of Hearing, dated
- 6.17.74 Answer, dated
- 7.10.74 Hearing opened

- 7.11.74 Hearing closed
 - 12.27.74 Administrative Law Judge's Order Correcting Transcript, dated
 - 1. 6.75 Administrative Law Judge's Decision, issued
 - 2.13.75 Respondent's Exceptions to the Decision of the Administrative Law Judge, received
 - 6. 6.75 Board's Decision and Order, dated
-

[Dated 1/6/75]

[JD-821-74
New York, N. Y.]

* * * * *

DECISION

Statement of the Case

SIDNEY D. GOLDBERG, Administrative Law Judge: In this case, tried before me in New York, N. Y., on July 10 and 11, 1974, the complaint,^{1/} issued pursuant to Section 10(b) of the National Labor Relations Act, as amended (the Act), alleges that Zim Textile Corp. (respondent) a wholesale dealer in blankers, bedspreads, towels and linens, had interfered with, restrained and coerced employees in their self-organizational activities by threats of discharge and promises of benefits; that it had deprived its employees of pay which was due them, discharged them and laid off one employee to discourage membership in District 65, Distributive Workers of America (the union) and that it had refused to bargain with the union as the collective-bargaining representative of its employees in an appropriate unit although it knew that the union had been designated as such representative by a majority of the employees in the unit.

Respondent answered, denying the threats and promises but admitting that it had discharged two employees. The answer further alleged that the employees were reinstated without loss of pay and that the subsequent layoff of one of them was dictated by economic considerations. With respect to the question of bargaining the answer admitted that the unit set forth in the complaint was and is appropriate but it alleged that, although respondent knew that two of the three

^{1/} Issued June 6, 1974, on a charge filed May 6 and an amended charge filed May 10, 1974.

employees in the unit had designated the union as their collective bargaining representative, it was entitled to have two elections conducted by the Board; viz., a preliminary test to determine whether the office clerical employee should be included, and another to determine whether the employees in the unit after such preliminary election desired the union as their collective bargaining representative.

The issues raised by the answer came on for trial before me as set forth above. All parties were represented. They were given an opportunity to adduce evidence, cross-examine witnesses, and argue on the facts and the law. A brief filed by counsel for respondent has been considered.

For the reasons hereafter set forth in detail, I find that respondent interfered with the self-organizational rights of its employees and discharged Israel Colon and Nelson Vega on April 4, 1974 to discourage their membership in the union. The subsequent layoff of Vega, although justified at a later date by business considerations, was accelerated to discourage his membership in the union and to prevent him from voting in the representation proceeding then pending. I find, however, that respondent's refusal to pay Colon and Vega for Good Friday did not violate the Act because it has not been established that they were entitled to pay for that day. With respect to the allegations of refusal to bargain, I find that the stated unit is an appropriate one and that respondent is not entitled to a separate election to determine whether the office clerical employee desires to be included in the unit. I find that respondent, by its unfair labor practices, has made impossible the holding of a fair election and I further find that, because respondent determined, by a method of its own choice, i. e., a direct poll, that a majority of the employees in the unit had designated the union as their collective bargaining representative, respondent is obligated to bargain with it.

Upon the entire record herein,^{2/} including designated portions of the record in the representation proceeding involving respondent and the union (No. 2-RC-16475), and considering the demeanor of the witnesses while testifying, I make the following:

Findings of Fact

1. The parties

Zim Textile Corp., a New York corporation, is wholly owned by Morris Zimbach, who is its president. It is engaged in selling towels and bed linens to retailers in the New York City metropolitan area. It admits that it annually imports into New York, goods valued at more than \$50,000 and that it is an employer engaged in commerce. I so find.

The union is a labor organization.

2. Background

After several years at another location in New York, Zim moved, in 1971, to 6 East 32nd Street in Manhattan where it occupies about 7000 square feet on an upper floor. Part of this area consists of an entry and three offices; the balance is warehouse space. Although Zimbach is the sole owner of respondent, he is about 70 years old and has been reducing his personal activity. At the time of the events herein, was devoting only about 20 or 30 percent of his time to the business, half inside the premises and half on the outside. His two sons-in-law, Martin Zell and Jerome Mockson, are in direct charge of its operations: Mockson devotes his entire time to selling and Zell supervises the work of the office and the warehouse.

^{2/} Typographical errors in the transcript of proceedings have been corrected by order dated December 27, 1974.

The merchandise respondent sells is purchased directly from the mills. Its principal supplier is Cannon Mills, from which it makes about 90 percent of its purchases, two-thirds of these purchases consisting of sheets and the balance of towels. About 6 percent of its purchases are blankets from Fieldcrest and the remainder of its goods, mostly bedspreads, is obtained from Burlington Mills and Georgia Mills. Only a small part of the goods purchased and resold by respondent passes through its physical possession at the New York City premises. The mills hold most of the merchandise in their own warehouses, although title has passed to respondent, where they are subject to respondent's directions for shipping directly to respondent's customers. However, when the mill warehouses are short of storage space, they may ask respondent to take physical possession of part of its stored inventory. Most of the merchandise brought to the New York premises consists of small or special purchases, or goods which respondent desires either to store temporarily or to repack for shipping to customers.

Martin Zell, who acted for respondent in the events leading to this litigation, became employed in 1970. At that time, there was only one regular employee working in the storage area of the premises but there was another warehouseman who was employed whenever needed. The regular employee left in 1971; he was succeeded early in 1972 by a man named Fred Rosado. In March 1973, Rosado recommended Israel Colon as a second warehouseman and he was hired. Rosado was discharged in September 1973 and on October 22, 1973, Nelson Vega was hired.

Prior to October 1972 respondent had no office employee: Zell did whatever was necessary and respondent's accountant made periodic visits to keep the necessary records. Since that time, respondent has had an office employee to keep the records and type

bills and letters. Zell has continued to handle the payroll, preparing the checks for signature by Zimbach.

3. Outline of events

In November or December of 1973, Colon's wife became enrolled in a training program and she and their children lost their eligibility for public medical assistance. Colon told Zell about the development and asked whether some sort of medical assurance could be given to him in connection with his employment. Colon's testimony conflicts with that of Zell concerning the details of their conversation but there is no dispute that Colon made the request and Zell was unable to grant it at that time.

Colon and Vega signed applications for membership in the union on February 7, 1974. On March 28, Ralph Passman and Edward Pagan, two organizers for the union, visited respondent's premises and spoke with Zell, telling him that the union represented the company's employees.^{3/} Zell said that the president of the company was not there and, according to Zell, Passman said, as he left, "I see that we are going to have to file."

Shortly after the visit of the union organizers Zell asked Colon for an explanation of that visit and Colon said that he and Vega wanted the medical and other benefits that could be obtained through the union. Zell made some sort of substitute offer and asked that Colon discuss it at home that night and with Vega the next day. Colon promised to do so and admitted that he said: "If I have these things, I don't need the union." The following day, Colon and Vega talked with each other about Zell's offer and, at lunch time, they went down to the union office. It is clear that Zell believed that their purpose was

^{3/} The conflicts in testimony concerning the specific statements by Passman are discussed hereafter.

to withdraw their applications for representation and to have the union withhold the filing mentioned by Passman the previous day. He testified that Colon said, on his return, "Don't worry, it is taken care of."

On Monday, April 1, Zell testified, he looked in vain for a letter from the union disclaiming any interest in the employees; he asked Colon about it, and Colon evaded answering. Zell called the union office and reached Passman; he then had Colon and Vega pick up telephone extensions in other parts of the premises and he asked Passman why the expected letter had not been received. Passman answered that it was too late to stop the filing ^{4/} and that, if the employees did not want union representation, they could vote "no."

On Thursday morning, April 4, Zell received, in the morning mail, a letter from the Regional Director of the Board, enclosing a copy of the representation petition filed by the union on April 3. The petition describes the unit as: "Included - shipping - receiving - stock - office-production & maintenance; Excluded - supervisors under the Act and guards." It states that there are 3 employees in the unit and that "Request for Recognition as Bargaining Representative was made on April 3, 1974 and Employer declined recognition on or about March 27, 1974." Zell telephoned the Board's Regional Office and spoke with Regional Director Danielson. The Regional Director declined to give him any advice but noted that the matter was "complicated" and suggested that, "before getting into any problems," he consult an attorney.

Vega reported for work first that morning and went to the lavatory to change his clothes. When Colon came in a few minutes later, Zell showed him the documents he had received and pointed out that the petition had been filed the previous day despite his understanding

4/ Passman testified that this conversation occurred on April 3.

that the two employees had promised that the matter would be "straightened out." Zell continued by saying that this made it necessary for him to retain an attorney at the cost of "thousands of dollars." Zell was shouting in anger and Colon, his temper also rising, pounded the desk and said he wanted the union. At this, Zell said: "If you want the union you are fired!" Zell then shouted to Vega, who was still in the lavatory, "Nelson, do you want the union?" When Vega answered that he did, Zell said: "You are fired, too; get out!" The two men pointed out to Zell that they were not quitting but being discharged, and they went to the union office to report the development to Passman. Later that morning, Passman and Pagan returned to respondent's office with Colon and Vega. Passman asked Zell to reinstate Colon and Vega; Zell answered that the matter was out of his hands and that the union representatives would have to speak with his attorney. Zell also said that he would see them "before the Labor Board." Passman noted that respondent's conduct was an unfair labor practice and the discharged employees, together with the union representatives, left.

That afternoon respondent consulted counsel and Zell telephoned Passman to say that he had reconsidered and would reinstate Colon and Vega. Pagan communicated with them, they went back to respondent's premises the next morning and returned to work. Their pay checks for that week contained their full weekly pay.

The Friday of the following week, April 12, was Good Friday. On Thursday morning, Colon and Vega told Zell that, because of their religious beliefs, they would like to be off on Good Friday. Zell answered that they could have the day off but would not be paid for it. There was no further conversation between Zell and the employees on the subject. ^{5/}

^{5/} Neither Colon nor Vega worked on Friday and neither was paid for it.

Shortly after 5 p. m. on that same day, Thursday, April 11, Zell told Vega that work was slow and he would have to be laid off. Zell also said that, "as soon as things pick up," he would recall him and asked Vega for his new address and phone number. Respondent has not recalled Vega and has not hired a replacement for him. At the time of the trial, Colon was still in respondent's employ.

The hearing on the union's petition for election was held on April 17, 1974. Respondent was represented by counsel and Passman represented the union. The union contended that an appropriate unit consisted of the two employees in shipping, receiving and stock maintenance, and the one in the office. Respondent agreed that the appropriate unit consisted of the warehouse and office employees but claimed that there were only two employees because the third one, who had been laid off the previous week "was not temporarily laid off as that term is understood." Respondent's sole witness was Zell. His testimony in that proceeding has been incorporated, by stipulation, in this case. Zell's testimony was entirely concerned with respondent's economic justification for laying off Vega for the purpose of showing that there was little or no probability of his being recalled. The Regional Director's Decision and Direction of Election, issued April 26th found that:

. . . a unit appropriate for the purposes of collective bargaining . . . [consists of] . . . all shipping, receiving, stock, office clerical, production and maintenance employees employed by the Employer

and it notes that the employer was in agreement that this unit, the one sought by the union, was appropriate. The Regional Director further found that Vega "does not have a reasonable expectancy of reemployment" and that he would not, therefore, be entitled to vote.

On June 4, the union requested withdrawal of its petition in the representation proceeding; on June 6 the complaint herein was issued and on June 7 the Regional Director, citing the issuance of the complaint and noting that it included allegations of unlawful refusal to bargain which, if proved, would preclude the existence of a question concerning representation, permitted the withdrawal of the petition. His order also vacated the Decision and Direction of Election.

4. Contentions of the parties

The General Counsel contends that, when the union demanded recognition on March 28, it had cards from 2 of the 3 employees in the specified unit; that respondent made offers of benefit to the two warehouse employees, immediately thereafter, to undermine their support for the union; that when it received a copy of the representation petition filed by the union, it polled these employees and discharged them for their adherence to the union. Although respondent reinstated the employees the following day and they lost no wages because of their temporary layoff, he contends that this was a clear violation of Section 8(a)(3) and (1) of the Act. The General Counsel further contends that respondent's conduct in laying off Nelson Vega on April 11 was at least in part to discourage membership in the union and to dissipate the union's majority support. He also contends that it had been respondent's practice, since 1972, to pay its employees for Good Friday without requiring them to work that day and that its refusal to pay Colon and Vega for Good Friday in 1974 constituted additional discrimination to discourage their membership in the union.

These unfair labor practices, the General Counsel contends, are so pervasive as to make impossible the holding of a fair election and that, for this reason, a bargaining order should issue. He also

contends that respondent, by polling 2 of the 3 employees on April 4 and finding them in support of the union, is bound by its own choice of method for determining their desires concerning representation and that it should be required to recognize the union.

Respondent concedes that its discharge of Colon and Vega on April 4 was in violation of Section 8(a)(3) of the Act but contends that its conduct in promptly reinstating them and paying them for the interval of separation neutralizes the union animus of its conduct. It further contends it did not otherwise interfere with, restrain or coerce employees and that the layoff of Vega on April 11th was dictated solely by the decline in work for him to do. It argues that it is entitled to require that the union be certified before recognition as the representative of the remaining employees and that the office clerical employee should be afforded an opportunity to choose whether she wishes to be included in the bargaining unit.

5. Discussion and conclusions

a. Pre-demand activity

Colon, who was the moving force behind the union activity, testified that it was in November or December of 1973 that he spoke with Zell and told him of his concern about obtaining medical insurance because his wife lost her eligibility for public assistance for medical care. He also testified that, when he asked Zell for some kind of medical insurance through his employment, Zell answered that he would try to get him into respondent's medical plan on the next occasion when entry was possible but that he would have to speak with Zimbach and Zimbach might not go for it. Colon testified that he then said that he would go to the union and Zell replied that Zimbach would "throw them into the street." Colon also testified that subsequently, although he had not made any contact with the

union, he told Zell that he had and that Zell said: "I don't care, but if the old man [Zimbach] finds out, he will fire you." Vega corroborated Colon to the extent of testifying that Colon asked Zell for additional benefits and that Zell's promises never resulted in any changes.

Zell conceded that Colon had spoken with him about obtaining medical insurance but he testified that there was never any mention of a union; that he promised to have Colon included in the medical plan when it was next open for the purpose but denied that he had ever mentioned a union and he denied that he had said anything about anyone being fired for joining a union.

I am not persuaded that there was any mention of the union until the visit of Passman and Pagan on March 28. Zell testified that he didn't get along with his father-in-law and that he didn't "give a dam" about the business. His testimony concerning his friction with Zimbach and his complete absence from respondent's premises between January 10th and 21st was corroborated by Colon. Accordingly, I do not find it proved that respondent, in November or December, 1973, interfered with, restrained or coerced its employees in their concerted activities.

b. The demand

Zell and the employees testified that Passman and Pagan first visited respondent's premises some time before the middle of March. Both Colon and Zell testified that on that visit Passman said that the union represented the employees ^{6/} and wanted to speak

^{6/} Zell testified that Passman's specific words were "Your boys signed up for our union and we would like to speak to the president of the company." Whether his use of the word "boys" was designed to affect the composition of the unit need not be determined since respondent several times conceded that a unit consisting of all the employees was an appropriate one.

to the president of the company. Zell answered that he was away and Passman left his card, requesting that the president get in touch with him. Zell testified that he put the card on Zimbach's desk but that, since he was not on speaking terms with his father-in-law, he assumed that Mockson delivered the message.

On March 28, Passman and Pagan again visited respondent's premises; again he was told that the responsible officer was away for the week. It was on this occasion, according to the testimony of Zell, that Passman made the statement "I see that we are going to have to file." While Passman did not recall what he said on this occasion and did not even recall that he visited respondent's premises twice, Zell's testimony that there were two visits is confirmed, inferentially, by Vega, and Colcn confirmed Zell's testimony concerning Passman's initial visit. I find that the union officials visited respondent's premises about March 15 and, again, on March 28 and that, on the second visit, Passman made some reference to filing.

On April 4, Zell received the copy of the petition filed by the union. As set forth above, it designated the unit as one including both the warehouse and office clerical employees, a total of 3. As of that date, therefore, respondent was made aware that union sought recognition for all 3 of respondent's employees.^{7/}

^{7/} Respondent does not directly attack the validity of the union's demand or base its refusal upon any uncertainty concerning the employees for whom the union was requesting recognition. Its brief, however, states that the demand was made "only" in the petition and that Passman conceded that the petition was the only occasion on which he specified the unit sought. It does not appear what argument respondent is making on this point: between Passman's conversations with Zell, which I find constituted a direct or clearly inferential message that the union desired to bargain on behalf of the employees, and the petition setting forth the unit, received on the morning of April 4, respondent had received an adequate demand. No special words

c. Post demand interference

Immediately after the union agents left respondent's office on March 28, as set forth above, Zell presented a proposition to Colon to persuade him and Vega to withdraw their designations of the union as their bargaining representative. Respondent's brief sets forth his statement in detail, including the fact that Zell, after describing his proposal to Colon, suggested that Colon discuss it with his wife and with Vega and, "if they decided they didn't want a union, to go down to the union and tell them so." It also points out that Colon's testimony confirms that of Zell.

While the complaint, as issued and served, did not allege that this offer interfered with, restrained and coerced the employees, the General Counsel, at the conclusion of the testimony, moved that it be amended to include that allegation. Respondent objected, but was unable to state how it would be prejudiced by the amendment. Decision was reserved and respondent was invited to argue the question in its post-trial brief. In its brief, respondent's only contention on this point is that the evidence does not support the allegation which the General Counsel would incorporate by his proposed amendment.

The subject matter of the proposed amendment is closely related to the other conduct alleged in the complaint as unfair labor practices; it is alleged to have been committed by the same supervisor; it was fully litigated and respondent has not shown that it would

7/ (Continued) are necessary in conveying such demand: it is sufficient that the employer know that it is being asked to bargain and the group of employees for whom such bargaining is sought. (See Benson Wholesale Co., 164 NLRB 536, 551; Adams Book Company, Inc., 203 NLRB No. 120). I find that, as of the receipt of the copy of the petition in the morning on April 4, 1974, respondent was adequately informed of the union's desire and that the demand was effective.

be prejudiced in any way by the granting of the motion. I find that the matter was fully litigated and that the ends of justice would be served by granting the motion. Accordingly the motion of the General Counsel is granted and the complaint is amended as requested.^{8/}

The facts concerning Zell's offer of medical and pension benefits to Colon and Vega are undisputed. Zell's own testimony shows that he made these promises as an express alternative to the benefits that the employees could obtain through the union and that he conditioned the granting of them on the employees' repudiation of their support for the union. This conduct, I find, constituted interference, restraint and coercion by respondent and it thereby violated Section 8(a)(1) of the Act.

The additional pressure by Zell to coerce Colon and Vega into repudiating their support for the union, as evidenced by his request that they go to the union office for that purpose on March 29, and his effort on April 1, by the telephone call to the union, with Colon and Vega on separate telephone extensions, to compel them to withdraw their support, are not alleged as separate unfair labor practices and, therefore, no findings are made concerning Zell's conduct on those occasions.

d. Respondent's poll and discharge
of Vega and Colon

The facts set forth above concerning Zell's questioning of Colon and Vega on the morning of April 4 are not disputed and his discharge of both of them was expressly based upon their support for the union. To be explored at this point are the conclusions to be drawn from Zell's conduct.

Respondent concedes that, by Zell's actions, it violated Section 8(a)(3) of the Act ^{9/} but it argues that its prompt corrective action in reinstating the two employees on the following day and its payment to them of their full wages without deduction for the interim period, effectively remedies its unlawful conduct. This argument is acceptable only to the extent that it obviates the necessity for an order directing reinstatement and providing reimbursement for that particular period: the manifestation of respondent's union animus and this demonstration of the lengths to which it would go in giving effect to that animus have not been expunged. ^{10/}

In addition to this manifestation of union animus, respondent's conduct in this incident brought about another result. Zell, when he questioned Colon and Vega concerning their support for the union, had been informed by the petition that the union sought recognition for a unit containing all of 3 of respondent's employees. When, therefore, he questioned 2 of these 3 employees and found them to be in support of the union, he knew that a clear majority of the employees ^{11/} wished to have the union represent them. Since the

^{9/} No reference is made in respondent's brief to its conduct of this poll without the safeguards required by the Board's decision in Struckness Construction Co., Inc., 165 NLRB 1062. The facts are undisputed and I find that, by this conduct, respondent committed an unfair labor practice violative of Section 8(a)(1) of the Act. (Crow, Inc., 206 NLRB No. 107, JD p. 10).

^{10/} Respondent's counsel, citing J. Levine Textile, 173 NLRB 837, relies upon Zell's "naivete and inexperience in union representation matter" to excuse his conduct. In the case cited, however, the issue was the employer's good faith in refusing to recognize the union. Zell's conduct herein exhibited violent and uninhibited animus to the exercise by respondent's employees of their rights guaranteed by law.

^{11/} Several times during the representation proceeding respondent conceded that all of its employees constitute an appropriate bargaining unit. The allegation in the complaint that all the

determination of employees' wishes concerning union representation is, in essence, the principal function of the Board's electoral process, it follows that, when that function has been carried out in a manner chosen by the employer for that purpose and the employees are shown to favor representation, the employer's obligation to bargain with the union has been effectively established notwithstanding its dissatisfaction with the result.^{12/} The fact that there was pending a Board proceeding for that same purpose does not, as respondent contends, make this principle inapplicable.^{13/} Accordingly,

^{11/} employees constitute an appropriate unit was not denied by the answer, although an attempt was made during the trial, to withdraw the admission. At the end of the trial respondent conceded that all of its employees constitute an appropriate unit and, finally, respondent's counsel, in his brief, makes the same concession, coupling it with the argument that an election should still be held in that unit, with the office clerical employee given an opportunity to express her wishes about being included. I find that the unit set forth in the complaint, consisting of all of respondent's employees, with the statutory exceptions, constitutes a unit appropriate for collective bargaining.

^{12/} Schrieber Freight Lines, Inc., 204 NLRB No. 163; Sullivan Electric Co., 199 NLRB 809. See also: N. L. R. B. v. Gissel Packing Co., 395 U.S. 575 at 595-598.

Nothing in the decision of the Supreme Court in Linden Lumber etc. v. N. L. R. B. etc. (December 23, 1974; 43 U.S. Law Week 4097) affects this conclusion. In footnote 9 of its opinion, the court wrote:

We do not reach the question whether the same result obtains if the employer breaches its agreement to permit majority status to be determined by means other than a Board election. See Snow & Sons, 134 NLRB 709 (1961), *enf'd*, 308 F.2d 687 (C.A. 9, 1962).

The method used in this case to determine the employees' wishes was chosen unilaterally by respondent and acquiesced in by the employees. Accordingly, as far as respondent is concerned, the test of voluntary agreement was met, and its refusal to abide by the result thereof constitutes a breach of that imposed agreement.

^{13/} Soil Mechanics Corporation, 200 NLRB 544.

I find that, on April 4, 1974, respondent became obligated to bargain with the union as the collective bargaining representative of its employees and that its refusal to do so violates Section 8(a)(5) of the Act.^{14/}

e. The layoff of Vega

Here, again, there is no dispute concerning the facts: Vega was told that he was being laid off because of the slowdown in respondent's business and that he would be recalled if business picked up.

Zell testified that the determination to reduce the number of warehousemen from 2 to 1 was made in January but that, since it was known that a large shipment would arrive in late March, Vega was kept on pending its receipt. The two "piggy-back" trailers,

^{14/} Respondent's contention that the office clerical employee should be given an opportunity to express her wishes concerning her inclusion in the unit -- the so-called "Globe" determination (Globe Manufacturing and Stamping Co., 3 NLRB 294) -- must be rejected for several reasons. In the first place, there is no pending representation proceeding to which it could be applied since the proceeding involving respondent was withdrawn by the union upon the issuance of the complaint herein. Second: the separate polling procedure can be applied only to situations in which the fringe or residual employees constitute a separate craft (Walt Disney World Co., 215 NLRB No. 89) and where they would, by themselves or in combination with other employees, constitute a separate appropriate unit (See: National Broadcasting Company, Inc., 202 NLRB No. 77; Syracuse University, 204 NLRB No. 85). In addition to the fact that the single employee in question is an office clerical employee and practically by definition not a separate craft, her position as the sole employee being designated for such treatment precludes her being appropriate as a separate unit. Third: respondent has conceded herein that a unit of all its employees is appropriate. Fourth: there is no showing that the interests of the clerical employee differ from those of the other employees. Finally, the separation of the office clerical employee from the other employee would, as respondent recognizes, reduce the remaining unit to one employee and

containing 473 cartons weighing 28,121 pounds, did arrive on March 26 and were unloaded on that day and on the 27th. Zell testified that, with the completion of the warehouse work on this shipment, it was decided to lay off Vega on April 12, the date being advanced to the 11th due to Vega's statement that he would not work on the 12th because it was Good Friday.

The conduct of respondent towards its employees Colon and Vega, in the context of their adherence to the union, has been found violative of the Act in several respects. All of these violations, moreover, disclose a strong union animus and the language used by Zell in discussing his attitude toward those activities even on the witness stand, was highly antagonistic.

In addition to respondent's strong antagonism to its employees adherence to the union, as shown by the unfair labor practices found above, it is to be noted that during this same period, the second week in April, a critical step occurred in the progress of the representation proceeding. According to the record of that proceeding, of which official notice is taken, on April 10 respondent received the notice that a hearing would be held on April 17. Respondent then had competent legal counsel and the inference is inescapable that it had been advised that the holding of an election would follow shortly thereafter. Zell's testimony at the representation hearing was introduced in this case and it shows that such testimony was devoted, in large measure, to proving that Vega had very little likelihood of reinstatement and should not, therefore, be eligible to vote. Since there is no evidence in this case that the office clerical employee had signed an

14/ (Continued) thereby frustrate the right of self-organization by respondent's employees after the designation of the union as their collective bargaining representative by a majority of those employed at the time of that designation.

authorization card for the union or expressed any interest in it, it is a fair inference that respondent believed that she would not vote for it. With Colon, who was likely to vote for the union, as the only other employee, respondent would have good reason to expect the election to result in a tie vote of 1 to 1, -- insufficient to constitute a majority for the union.

The recentness and severity of respondent's unlawful anti-union conduct would justify an inference that its lay-off of Vega under the circumstances described was to dissipate the union's support. I would have no hesitation in drawing that inference and finding that the lay-off of Vega was discriminatory except that respondent has pleaded, as a defense to the relevant allegation of the complaint, that the lay-off was justified by economic considerations.

In support of this defense, respondent has introduced several summaries of its business activities showing the amount of merchandise moving into and out of its warehouse.^{15/}

The relevant part of the summary of goods received into respondent's New York warehouse shows that the last large shipment received in 1973 consisted of 285 cartons of towels weighing 28,259 pounds and that it arrived on December 3 and 4. Thereafter, respondent received only two small shipments -- one of 9 cartons weighing 644 pounds on December 10, 1973, and one of 13 cartons of towels weighing 855 pounds on February 12, 1974 -- prior to the large shipment of 473 cartons (all but 15 being towels) weighing 28,121 pounds which arrived on March 26 and 27. During this interval Vega was kept on the payroll. After Vega was laid off, respondent received 63

^{15/} The principal summary, showing goods received in the New York warehouse during the year 1973 and for the elapsed portion of the year 1974, was submitted pursuant to stipulation after the close of the trial. The General Counsel elected not to file a post-trial brief and, therefore, none of this data is controverted.

cartons weighing 4544 pounds on April 25; 26 cartons weighing 1872 pounds on May 24; and 417 cartons weighing 15,198 pounds on June 11. Moreover, a summary of cartons shipped out of the warehouse shows that, although the number shipped between April and November 1973 ranged from 171 to 260, there were only 126 shipped in December, 119 in January, 100 in February and 90 in March. In April the figure rose to 113, but at least 75 of those were sent out after Vega's discharge. In May and June, the numbers of cartons shipped out were only 50 and 38, respectively.

These figures show that, despite the tremendous drop in cartons received between December 4 and March 27 and the notable drop in cartons shipped during the same period, respondent found no economic necessity for laying off the junior warehouseman. Moreover, Zell testified that during prior intervals between large shipments respondent did not lay off the second warehouse employee but found work for him cleaning the premises and straightening up the stock. After the advent of union activity, however, and despite the expected arrival, on April 25, of a substantial shipment as well as an increase in outbound shipments over the rate for the preceding three months, ^{16/} respondent determined that "business conditions" directed the layoff of Vega.

The data and testimony of respondent do indicate, as respondent argues, that there was a substantial fall-off in the amount of merchandise passing through its New York warehouse. Zell testified, however, that while in 1973 about 15 percent of respondent's merchandise passed through its New York warehouse, for the portion of 1974 prior to the

^{16/} Respondent could anticipate such arrivals several months in advance, as indicated by Zell's testimony that management knew, in January, that there would be a large shipment received about March 24. The situation with respect to outbound shipments may have been based upon other factors but it is fair to infer that respondent could anticipate their necessity substantially before their occurrence.

time of the trial, that percentage had been reduced to 5 to 7 percent. The record also shows that respondent has at least some measure of control over the proportion of its merchandise that passes through its New York warehouse.

Upon all the foregoing, I find that respondent has failed to establish a business reason for the layoff of Vega on April 11. It has shown a diminution of its warehouse operation during the first half of 1974 as compared with the first half of 1973 but, considering its retention of Vega during the slack period between December 3, 1973 and March 26, 1974, before respondent became aware of union activity, I find that the fall-off in respondent's business would not, absent Vega's union activity and the approaching representation election, have resulted in his layoff until Friday, May 17, at the earliest.

Accordingly, Vega's discharge one month prior to its economic justification therefor constituted discrimination to discourage membership in the union and violated Section 8(a)(3) and (1) of the Act.

f. The Good Friday pay

The complaint alleges that it had been respondent's practice to grant Good Friday as a paid holiday but that, for Good Friday on April 12, 1974, it altered that practice because its employees had joined or assisted the union.

In support of this allegation, Colon testified that he was on respondent's payroll during the week ending April 20, 1973, which was Good Friday; that he did not work on Good Friday but was paid for the day. Testimony on this matter was also given by Fred Rosado, who worked in respondent's New York warehouse from March 1972 to September 1973. His employment covered the Good Fridays which occurred on March 31, 1972 and April 20, 1973 and he testified that he was paid for both days although he did not work on either one.

Zell disputed the testimony of Colon and Rosado, testifying that they were permitted, if they wished, to stay away from work on Good Fridays but they were not paid for the day if they did not work.

Respondent produced the checks for the wages of its warehouse employees for the weeks containing Good Friday in 1971, 1972, 1973 and 1974. According to Zell's uncontradicted testimony, respondent's method of paying its warehouse employees was for him to prepare the checks and for Zimbach to sign them; the checks were then presented to the individual employees who endorsed them in blank; the endorsed checks were then taken to the bank by Zimbach, Zell or Mockson, who also endorsed them in blank and cashed them; they then returned to respondent's premises and gave the cash to the individual employees. On some occasions, Zell testified, Zimbach had sufficient cash in his possession to pay the employees the amounts of their checks and he would use that cash without going to the bank the same day but he would reimburse himself for the cash so paid out by cashing the endorsed checks a few days later. The checks to Rosado for the week ending March 31, 1972, which was Good Friday; the checks to Rosado and Colon in 1973 for the week containing Good Friday and for the following week; and the checks to Colon and Vega for the week ending on Good Friday, April 12, 1974, all reflect this practice. In addition to the written endorsements described, each of these checks bears the imprint of the teller's date-and-identification stamp and of the "PAID" stamp used by the bank to indicate payment of the amount of the check out of the depositor's account. ^{17/}

In 1971, Good Friday fell on April 9; respondent's warehouse employees at the time were named Albert Burch and Norman Harrison; the checks to each of them were dated April 9; they were endorsed only

^{17/} The description of these mechanical markings is made on the basis of judicial notice. Wigmore on Evidence, Sec. 2580. "Judges are not necessarily to be ignorant in Court of what everybody else, and they themselves out of court, are familiar with." (Lumley v. Gye, 2 El. & Bl. 266 [1853]). There is nothing in the record that could be interpreted as disputing the description of the markings judicially noticed.

by the payees; the teller's stamp is dated April 9; and the "PAID" stamp (at this time a perforation was used) is also dated April 9. Harrison's check has, in the ruled box, figures showing \$6.50 subtracted from \$60, and a remainder of \$53.50; but there is no explanation of these figures. Neither Burch nor Harrison testified; Zell testified that respondent kept no record of the days worked by its employees or the details of their wages. ^{18/}

For 1972 there is only the check to Rosado. This check, in the sum of \$135.30, is dated March 31, which was Good Friday, and it bears the endorsements of Rosado and Mockson. Rosado testified that he received the money represented by this check the day before Good Friday, i. e. on March 30. ^{19/}

The General Counsel contends that the "PAID" stamp on this check, dated March 30, 1972, corroborates Rosado's testimony that he received the check on March 30. The principal weakness in this contention is that the teller's date stamp is March 31 and it is impossible to explain how the bank could stamp the check "PAID" the day before, according to the teller's stamp, it was received. The only possible explanation is that, through some unusual inadvertence, the date on the bank's "PAID" stamp was not changed and the actual date of payment was March 31. Although Zell testified that no check was ever dated ahead, I do not accept his testimony as against that of Rosado that he received his pay the day before Good Friday and that he did not work on that day. It is possible that Zimbach had cash on hand adequate

^{18/} He testified that the check stub of each paycheck shows the deductions from total earnings but these stubs were not produced.

^{19/} Rosado testified that, when he started working for respondent in March 1972, he received \$110 per week; that after 2 weeks he was raised to \$120; and that he subsequently received raises to \$135 and \$140. When his total pay was \$135, he testified, he received \$114 net, and when it was \$140, he received \$119 net. There is no testimony to account for the \$135.30 amount of this check.

to give Rosado his money on Thursday and he could have reimbursed himself through the cashing of the endorsed check on Good Friday. Even if Rosado did receive his pay on Thursday and did not work on Friday, this is not proof that he was paid for Good Friday. The amount of the check is not explained by Rosado's testimony regarding the amounts of his usual net pay and, accordingly, no inference can be drawn from the check.

The 1973 checks to Rosado and Colon for the week ending on Good Friday, April 20, are, for Rosado \$114.45 and, for Colon \$82.48. Rosado's check, according to his testimony, represents his full net weekly pay at the gross wage of \$135. Colon did not testify to the amount of his full weekly wage at that time in 1973. Zell testified that these checks represent the amounts of a full week's work by each of these employees, although each of them was entitled to only 4 days pay, but this is only because they asked for a full week's wages to use for the coming holiday, and it was agreed that the extra day's pay so included would be deducted from their checks for the following week. The checks for the wages of the employees for the following week both have written, in the accounting box, "LESS GOOD FRIDAY PREVIOUS WEEK"; Rosado's check is for \$93.66 and Colon's check is for \$74.67. Both checks are endorsed by the payees and by Zimbach, and were cashed on Friday, April 27. Rosado testified that he refused to sign this check and that he put the check and the money ^{20/} back on the office clerk's desk. He testified that he told Zell the amount was wrong but that Zell said that was all Rosado would get; that they started shouting at each other until Zimbach took him, Rosado, aside, gave him the money he claimed was due him, and asked him to be quiet. Rosado testified that Colon did not join in the argument because "He had nothing to do with it. That was just me and Marty [Zell]." He also

^{20/} Presumably advanced by respondent before the cashing of the check.

testified that he did not hear Colon say anything to either Zell or Zimbach on this subject and Colon did not testify that he did. Zell admitted that he had a dispute with Rosado over the Good Friday deduction but he denied that he heard Zimbach intervene or that he saw Zimbach give Rosado the extra money.

The 1974 checks to Colon and Vega for the week ending Good Friday, April 12, carry the full details of their wage computations.^{21/} Each computation begins with a gross figure for the four days, April 8 to 11, and shows deductions for lateness -- 58 minutes for Colon and 22 minutes for Vega -- and deductions for Social Security and tax withholding. Both checks are endorsed by the respective employees and by Zimbach and they were cashed at the bank on April 16, the following Tuesday.

All of the checks prove nothing about respondent's custom concerning payment for Good Friday. Acceptance of Rosado's testimony would prove only that he either had some private agreement with Zimbach about payment for Good Friday or that the vehemence of his protest persuaded Zimbach to buy his peace for about \$20. Colon's testimony is not sufficient for a finding that it was respondent's custom to pay the warehousemen for Good Friday without their working on that day. Accordingly, I cannot find that respondent's refusal to pay Colon and Vega for Good Friday constituted restraint or coercion based upon their protected activities and, to the extent that the complaint so alleges, it must be dismissed.

g. The bargaining order

As stated above, respondent chose its own method of determining the extent of its employees' support for the union by taking a direct poll

^{21/} Zell testified that he began this practice when he retained counsel on April 3.

and it cannot evade the result of its action because it dislikes that result. A bargaining order would be justified on this basis alone.

The General Counsel also argues that respondent's pervasive unfair labor practices have made it impossible to hold a fair election and that, majority support having been proved, a bargaining order should issue on this basis as well.

Respondent's contrary argument is that, in the Gissel case,^{22/} the Supreme Court clearly indicated that representation proceedings constitute the preferred method for determining the status of a union and that that method should be followed in this case. It recognizes, however, that the court also made reference to situations in which the employer's unfair labor practices "have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside" and that in such cases the Board must evaluate the disruptive effects of such conduct.

Respondent's standard, thus expressed, appears to be the correct one: in this case respondent's conduct: (a) in interfering with its employees protected concerted activities following the union's appearance on March 28; (b) its undisputed pressure on the employees on April 1 to repudiate the union (although not found to be independent unfair labor practices because not alleged as such in the complaint); (c) its direct polling Colon and Vega on April 3 and its prompt discharge of them for their declared support of the union; and (d) the accelerated layoff of Vega on April 11; sufficiently pervade the atmosphere to make the holding of a fair election impossible.^{23/}

Accordingly, on the basis of respondent's conduct and of the union's majority support prior to that conduct, it is appropriate that it be directed to bargain with the union.

^{22/} N. L. R. B. v. Gissel Packing Co., 395 U. S. 575 (1969).

^{23/} N. L. R. B. v. Gissel Packing Co., 395 U. S. 575 at 610 et seq.; New Fairview Hall Convalescent Home, 206 NLRB No. 108; A. Rotundo & Sons, Inc., 212 NLRB No. 30.

6. The effect of the unfair labor practice
upon commerce

The activities of respondent, set forth in findings of fact numbered 3 and 5, occurring in connection with its operations set forth in findings of fact numbered 1 and 2, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

The Remedy

Having found that respondent has engaged in unfair labor practices, I shall recommend that it cease and desist therefrom and that it take affirmative action to effectuate the purposes of the Act.

Having found that respondent laid off Nelson Vega on April 11, 1974 rather than on May 17, 1974, to discourage his membership in the union, I shall recommend that it make him whole for any loss of compensation he may have suffered during that period with interest thereon as prescribed in Isis Plumbing & Heating Co., 138 NLRB 716.

Having found that respondent, after determining by a poll of its employees on April 4, 1974, that a majority had designated the union as their collective bargaining representative and that respondent, by its pervasive unfair labor practices, has made impossible the conduct of a fair election. I shall recommend that it bargain with the union as such representative of its employees.

In view of the nature and extent of the unfair labor practices found herein to have been engaged in by respondent, which indicate its determination to interfere aggressively with its employees' rights of self-organization and to thwart them if possible, I shall recommend a broad cease-and-desist order herein. ^{24/}

^{24/} John P. Krystiak d/b/a Red & White Super Markets, 172 NLRB No. 210, enf'd. 415 F. 2d 125 (C. A. 3).

Upon the foregoing findings of fact, and upon the entire record herein, I reach the following:

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The union is a labor organization within the meaning of Section 2(5) of the Act.
3. At the time of the activities set forth in the Decision, Martin Zell was a supervisor of respondent within the meaning of Section 2(11) of the Act and acted as its agent.
4. By offering medical, pension, and other benefits to its employees on condition that they withdraw support from the union and by coercively interrogating employees concerning their support for the union, respondent interfered with, restrained and coerced its employees and committed unfair labor practices within the meaning of Section 8(a)(1) of the Act.
5. By discharging Israel Colon and Nelson Vega on April 4, 1974, because they had signed applications for membership in the union, respondent discriminated against them to discourage their membership in the union and committed unfair labor practices within the meaning of Section 8(a)(3) of the Act.
6. By laying off Nelson Vega on April 11, 1974 while there was still work for him to do, respondent discriminated against him to discourage membership in the union and committed an unfair labor practice within the meaning of Section 8(a)(3) of the Act.
7. At the times material herein, and at this time, all shipping, receiving, stock, and office clerical employees of respondent, excluding guards, watchmen, and supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

8. By failing and refusing, since April 4, 1974, to bargain with the union as the collective bargaining representative of the employees in said unit, respondent has committed an unfair labor practice within the meaning of Section 8(a)(5) of the Act.

9. By refusing to bargain with the union as set forth in Conclusions of Law 6 and 7, by discharging Israel Colon and Nelson Vega on April 4, 1974, and by laying off Nelson Vega on April 11, 1974, respondent has interfered with, restrained, and coerced employees in their exercise of rights guaranteed in the Act and has committed unfair labor practices within the meaning of Section 3(a)(1) thereof.

10. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: 25/

ORDER

Respondent, Zim Textile Corp., its agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain with District 65, Distributive Workers of America, as the collective-bargaining representative of its employees in the unit described as follows:

All shipping, receiving, stock, office clerical production and maintenance employees at its New York premises,

25/ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

exclusive of guards, watchmen, and all supervisors, as defined in Section 2(11) of the National Labor Relations Act, as amended.

(b) Making threats of discharge or offers of benefit to employees to coerce them into refraining from the exercise of concerted activities for mutual aid or protection or from joining the said labor organization, or any other labor organization.

(c) Coercively interrogating its employees to interfere with, restrain, or coerce them in their exercise of right to self-organization.

(d) Discharging or laying off any employee to discourage any employee's membership in the above labor organization, or any other labor organization.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization or to engage in concerted activities for the purpose of collective bargaining and other mutual aid or protection, or to refrain from any and all such activities, except insofar as membership in a labor organization may be required pursuant to a collective-bargaining contract not inconsistent with Section 8(a)(3) of the said Act.

2. Take the following affirmative action to effectuate the policies of the Act.

(a) Upon request, meet and bargain with District 65, Distributive Workers of America, as the exclusive representative of all employees in the unit described in paragraph 1, above, and, if any understanding is reached, embody it in a signed agreement.

(b) Make whole Nelson Vega for any loss of compensation he may have suffered by being laid off April 11, 1974, instead of on May 17, 1974, with interest thereon at the rate of 6 percent per annum.

(c) Post at its premises in New York, New York, copies of the attached notice marked "Appendix." ^{26/} Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by its representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 2, in writing, within 20 days from the date of the receipt of this Decision, what steps it has taken to comply herewith.

3. The allegations of the complaint, insofar as not found by the Decision to be violative of the Act, are hereby dismissed.

Dated at Washington, D. C.

/s/ Sidney D. Goldberg
Administrative Law Judge

^{26/} In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The trial held at New York, N. Y., on July 10 and 11, 1974, in which we participated and had a chance to give evidence, resulted in a Decision that, since February 7, 1974, District 65, Distributive Workers of America has been, and it still is, the collective-bargaining representative of certain of our employees and that, by refusing to bargain with it, since April 4, 1974, that by interfering with their concerted activities by promises of benefit and coercive interrogation about such activities; by discharging them and laying them off prematurely to discourage their membership in the said union, we have committed unfair labor practices in violation of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended, and this notice is posted pursuant to that Decision.

The National Labor Relations Act, as amended, gives all employees the following rights:

- To organize themselves
- To form, join, or support unions
- To bargain as a group through a representative they choose
- To act together for collective bargaining or other mutual aid or protection
- To refrain from any or all such activities.

In recognition of these rights, we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively regarding wages, hours of work and other terms and conditions of employment with DISTRICT 65, DISTRIBUTIVE WORKERS OF AMERICA, as the exclusive bargaining representative of our employees in the following unit:

All shipping, receiving, stock, and office clerical employees of this company, excluding guards, watchmen and supervisors as defined in Section 2 (11) of the National Labor Relations Act, as amended.

WE WILL, upon request, bargain collectively with said union as exclusive representative of said employees and, if an agreement is reached, embody it in a signed contract.

WE WILL NOT make offers of benefit to induce our employees not to engage in concerted activities; WE WILL NOT coercively interrogate them concerning their membership in or support for the said labor organization, or any other labor organization; WE WILL NOT discharge or prematurely lay off any employee to discourage their membership in the said labor organization.

WE WILL make whole Nelson Vega for any wages he may have lost by being laid off on April 11, 1974, with interest thereon at 6 percent per annum.

WE WILL NOT in any other manner, interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by the National Labor Relations Act, except insofar as membership in a labor organization may be required pursuant to a collective bargaining contract not inconsistent with Section 8(a)(3) of said Act.

ZIM TEXTILE CORP.

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 36th Floor Federal Building, 26 Federal Plaza, New York, N. Y. 10007 (Tel. No. 212-264-0306).

[Dated 2/13/75]

EXCEPTIONS OF RESPONDENT ZIM TEXTILE CORP.
TO THE DECISION OF THE ADMINISTRATIVE LAW
JUDGE

Hon. Sidney D. Goldberg, Administrative Law Judge ("ALJ"), issued his Decision in the above case on January 6th, 1975, and found therein that Zim Textile Corp. ("Zim") had engaged in unfair labor practices violative of sections 8(a)(1), (3) and (5) of the Act.

Zim takes the following exceptions to the within Decision and submits its brief in support of the exceptions taken.

EXCEPTIONS

The ALJ erred in the following respects:

(1) By wrongfully finding a violation of section 8(a)(5) of the Act and issuing a bargaining order, thus upholding the Regional Director's wrongful facatur of his own Decision and Order Directing Election, where no unfair labor practices on the part of Zim could in the circumstances presented by the case, have a lingering or distorting effect on the election (Dec.* p. 2;6, line 47; 11-12, 19-23).

(2) Against a mass of admittedly uncontroverted evidence (Dec. p. 14, ftn. 15) of an economically justified and motivated layoff of the junior warehouseman on April 11, 1974; wholly without support in the evidence; and on nothing better than the date of Zim's receipt of a notice of representation hearing and the retention of "competent legal counsel"

* References are to the pages of the ALJ's Decision herein. Elsewhere in these exceptions and supporting brief, references "Tr p." are to pages of the stenographic transcript of the hearing herein held on July 10, and 11, 1974, and references "R. Tr p." are to pages of the stenographic transcript of the hearing held in the representation proceeding held on April 17, 1974 (Dec. p 2, lines 41-43; 2-RC-16475); Resp. Ex. 3 in Evidence.

(Dec. p 13, lines 26-34), finding the layoff "premature" and an unfair labor practice - palpably as a fail-safe backup for an otherwise untenable finding of an obligation to bargain fixed on April 4, 1974 (Dec. p 19, lines 1-36); and in arbitrarily selecting May 17, 1974 as the first day for legitimate economic layoff (Dec. p 15, line 27).

(3) In view of the fact that authorization cards were never exhibited, or offered to be exhibited, to Zim until July 10, 1974, the first day of the hearing herein, and the statement of the District 65 ("Union") representative at the representation hearing of April 17, 1974 that three of Zim's employees had joined the Union (Tr. p 99), it was not a fair inference on the part of the ALJ that Zim laid off the junior warehouseman in the belief or knowledge that it would result in a one to one split in the election (Dec. p 13, 14).

(4) Through the medium of a bargaining order, in arbitrarily depriving the office clerical employee Linda Balmeo of her right, in representation proceedings, to vote her preference guaranteed by section 7 of the Act (Dec. p. 11-13, 22).

(5) In finding that there was no "mention of the Union until the visit * * * on March 28 [1974]" (Dec. p 8, lines 19, 20), while conceding, vaguely, a prior visit of Union representatives "some time before the middle of March" (Dec. p 8, lines 31-33); and in finding, arbitrarily and against the evidence, that the "union officials visited respondent's premises about March 15" (Dec. p 9, lines 9, 10); while ignoring Zell's uncontroverted and corroborated testimony to such a first visit, overheard by warehousemen Israel Colon and Nelson Vega, Jr., probably the last week in February 1974 or possibly the beginning of March at which Union official Ralph Passman declared that "Your boys have signed for our union" (Tr. p 128, lines 13-23).

(6) Despite positive testimony of a resolution of Zim arrived at in early February 1974 to lay off the junior warehouseman upon completion of the two weeks work of warehouse inventory and rearrangement

following the expected heavy shipment which actually arrived on March 26 and 27, 1974 (R. Tr. p 34, lines 1-19; Tr. p. 167, lines 1-8; p 175, 176; Dec. p 13 lines 8-17 - a resolution erroneously attributed to January by the ALJ), and despite Martin Zell's knowledge of the Union's interest in the warehousemen for approximately 6 weeks prior to the layoff of April 11, 1974, attributing the timing of the layoff to the date of receipt of a notice of representation hearing, one day before the layoff (Dec. p 13, lines 26-34), thus implying that the mere pendency or imminence of a Board proceeding is "evidence" enough to suspend, on pain of unfair labor practice findings, an ordinary layoff for lack of work which all the uncontradicted evidence, documentary and in testimony, clearly supports as economically justified and motivated.

(7) In spite of the fact that in April 1974, the month of Vega's layoff, the incoming shipments were only one-seventh of the previous month's and the outgoing shipments were only half of the average monthly shipments out for the "good" period April-November 1973 (Dec. p 14, lines 19-36), finding there was enough work for Vega to mandate his continuance on payroll to May 17, 1974 (Dec. p. 14, lines 19-36; p. 15, lines 25-31), i. e., an illegal layoff "one month prior to its economic justification."

(8) Against the weight of uncontroverted testimony that it was economically advantageous to ship direct from the mills rather than through the New York warehouse (Tr. p 273, 274); that pressure from the mills was the primary reason for releasing goods from storage at the mills to the New York warehouse (Tr. p. 281-283); that the ratio of goods shipped direct from mills to customers against goods shipped to the New York warehouse went from 92% mills, 8% warehouse in 1972, to 83% mills, 17 warehouse in 1973, to 92-95% mills, 5-8% warehouse by July 1974 (R. Tr. p 15, lines 15-25; Tr. p. 283, lines 13-24); and that by July 1974 the overall quantity volume of goods inventoried by Zim had declined 30% (Tr. p 291, lines 1-7); the ALJ found that Zim

"has at least some measure of control over the proportion of its merchandise that passes through its New York warehouse" (Dec. p 15, lines 15-17), thus implying that an employer can be obliged on pain of being cast into unfair labor practices and remedies as severe as bargaining orders, back pay orders, etc., to adopt uneconomic measures to avoid layoffs.

(9) In sandbagging Zim between the accusations of an economic layoff too long delayed (Dec. p 14, lines 38-50; p 15 lines 1-7, 22-24) and yet prematurely executed on April 11, 1974 because "on April 10 respondent received the notice that a hearing would be held on April 17. Respondent then had competent legal counsel and the inference is inescapable that it had been advised that the holding of an election would follow shortly thereafter." (Dec. p 13, lines 31-34), the ALJ was spinning hypotheses in utter disregard of:

a) the findings of the Regional Director in his Decision and Order Directing Election (G.C. Ex. 4, Tr. p 106), and the evidence in the representation hearing transcript, that in the less than three years of operation in the present location to April 11, 1974, Zim employed no less than 7 warehousemen, never more than two at a time; covered the operation with just one warehouseman for substantial periods of time, and had no employee covering for as much as 13 weeks in one year (R. Tr. p. 26-34);

b) the fact that Zell was on notice of the Union's direct claim that Vega had signed up for the Union for approximately six weeks before April 11, 1974 (Tr. p 128, lines 11-25), yet obviously retained Vega for the heavy work demands for the two weeks following the large shipment into the warehouse expected in late March, 1974, laying him off at the end of the working week, shortened only because of Vega's announcement that he would not be working on Good Friday.

(10) In view of the fact that the only allegations of unfair labor practices in the original complaint to be sustained by the ALJ were

those gathered in the morning confrontation of April 4th, 1974 culminating in the discharge of Colon and Vega, but completely attenuated for any lingering and distorting effect on the election by their prompt reinstatement without any loss of pay, and the "premature" layoff of Vega on April 11th, 1974 against all the evidence of a "tremendous drop" (Dec. p 14, line 38) in Zim's business, but nevertheless apparently regarded as an unfair labor practice of necessity - the only event which, if so found, could constitute the requisite distortion of election conditions - , the ALJ, in the interest of beefing up the case by finding a pattern of union animus and commission of additional unfair labor practices on the part of Zim, also granted, erroneously, General Counsel's motion to amend the complaint at the hearing to let in an unrelated allegation of section 8(a)(1) violation of a coercive discussion with Colon by Zell on the afternoon of March 28, 1974, and then, improperly, finding the discussion violative of the Act (Dec. p 10, lines 1-27). Further, in improperly using the ensuing sequence of events (including a quotation from a brief, not from a record - Dec. p. 9, lines 27,28) through Friday, March 29th - Colon's discussion with Vega, the announcement to Zell they would go down to the Union, and Colon's announcement on return that it was "taken care of" - Dec. p 4, lines 33-38 - , and Monday, April 1st - the telephone conversation between Zell and Passman, with Colon and Vega listening on extensions, Passman saying it was "too late" to stop the filing and the employees could vote "no" if they didn't want the Union (Dec. p 4, lines 40-44; p 5, lines 1-3), the ALJ was adding prejudicial makeweights, neither alleged in nor added to the complaint to spell out a pattern of "animus" and coercion, which, although denied standing as unfair labor practices (Dec. p 10, lines 29-36), were as effectively used to fashion and support a bargaining order as though they were (Dec. p. 19, lines 26-28).

(11) With regard to the added allegations of coercive promises of benefits in Zell's conversation with Colon on the afternoon of March 28th, 1974 conditioned on his rejection of the Union:

a) The grant of the amendment was improper since it bore no close relationship, as a coercive promise of benefits and the first sustained unfair labor practice, allegedly committed a full week before the stormy outbursts of April 4, 1974 covered by paragraphs 12 and 13 of the complaint, nor to the layoff of Vega covered by paragraph 15 of the complaint.

b) Contrary to the ALJ's finding of 8(a)(1) coercion in the "promise of benefits" conversation between Zell and Colon on the afternoon of March 28th, 1974 (Dec. p. 10, lines 1-27), the corroborated evidence discloses that the essence of Zell's conversation was designed to call attention to a pre-existing promise of December 1973 to enroll Colon in the employer's Blue Cross-Blue Shield coverage in the "open period" of July 1974, and the truthful representation, not promise, that Zell had been working on company pension plans; both now in circumstances where a choice would be made by the warehouse employees between the duplicating plans of Union and employer (Tr. p. 54, lines 4-8; p. 213, 214; p. 39, lines 19-23). Additionally it was suggested that Colon talk it over with his wife that evening, discuss it with Vega the next day, and let Zell know (Tr. p. 40, lines 6-13). Vega related, succinctly, that Colon told him the following morning, "That Marty Zell had offered us a health plan * * * if we would drop the union, that's what he offered." (Tr. p. 78, line 25; p. 79, line 1). Even as amended, nothing in the substance of the conversation bespeaks an unfair labor practice or anything beyond the limits of uncoercive free speech.

(12) In overlooking the fact that the events of the afternoon of March 28, 1974 and of March 29th, 1974 were such that Zell was, justifiably, left with the impression that Colon and Vega did not desire union representation and had gone to the Union to head off the "filing," returning with that mission accomplished (Dec. p. 4, lines 27-38), it is apparent that Gissel Packing (395 U.S. 575) - Steel-Fab, Inc.,

212 NLRB No. 25 would, assuming arguendo the validity of a bargaining order in this case, have to provide the sole rationale for such a determination, rather than a finding of violation of section 8(a)(5) of the Act based on the most favorable result for a union of successive "pollings".

(13) In distorting the abusive argument and discharges of Thursday morning, April 4th, 1974, admittedly serious violations of sections 8(a)(1) and (3) of the Act and probably proper ground for a bargaining order but for the prompt reinstatement of the discharges without loss of pay in compliance with the Union's request for their reinstatement, into a "polling" based on a "voluntary agreement" between Zim and its two warehouse employees to abide by its result ((Dec. p. 12, lines 28-32; p. 11, lines 12-19; p. 12, lines 1-27), and as proof of abiding and unforgiveable "animus" (Dec. p. 11, lines 1-10), the ALJ:

a) Turned a vituperative diatribe against Colon, based on Zell's feeling of having been duped by Passman's observation of April 1st, 1974 that it was "too late" to stop the filing of the representation petition coupled with the April 3rd, 1974 filing date on the petition received that morning; a diatribe of complaint with respect to what Colon had done by deception, not a question and answer interrogation; an altercation in which Colon was not responding to a question when he, in anger, slammed his hand on the desk and shouted, "I don't give a ----, I want the union." (Tr. p. 41, lines 20-23; p. 226, lines 2-22). With Colon discharged for that declaration, the momentum of attention carried to Vega, more interrogatory in form than in actuality, and Vega was also immediately discharged (Tr. p. 42, lines 5-7). Holding the foregoing to be an agreed upon alternative method for determining the majority representative (as distinguished from the lingering distorting effect test of Gissel) is an unjustifiable extension of Sullivan Electric Co., 199

NLRB No. 97, so that voluntary disclosure of union adherence not in response to interrogatory polling would be enough to supersede a pending representation proceeding as a per se violation of section 8(a)(5) of the Act for an employer's refusal to recognize a union then and there as bargaining representative.

b) The ALJ ignored the fact that the only true agreement between Zim, on the one hand, and Union, Colon and Vega, on the other, was that the preferences of the employees would be voted in a Board conducted election gathered from the telephone conversation of April 1st wherein Passman stated to Zell, in the hearing of Colon and Vega, that if the men didn't want the Union, they could vote "no" in the election; and implicitly confirmed with the Union's demand which was limited to reinstatement, with all parties thereafter participating in the representation proceedings.

c) The ALJ ignores the fact that the Union made no contemporaneous demand for bargaining rights based on the incidents of the morning of April 4th, 1974, but rather, with full knowledge of the facts, went on to participate in informal conference, representation hearing, and made no request for withdrawal until after the issuance of the Regional Director's Decision and Order Directing Election which ruled that Vega was ineligible to vote because his layoff was of indefinite duration rather than temporary as that term is understood in representation proceedings. (G. C. Ex. 4, Tr. p. 106).

d) With regard to the "animus" of Zim (and his naivete in labor relations matters), the ALJ ignores the fact that Zell was anxious to be law abiding and correct, vide, his call to the Regional Director, on the morning of April 4th before the arrival of Vega and Colon, for legal advice upon his receipt of the representation proceeding; and, upon his retention of counsel that afternoon, reinstating Colon and Vega without loss of pay, and committing no unfair labor practices thereafter.

e) If "animus" is to be gathered from the purple language used in the harangue of April 4th and in the testimony descriptive of it (Dec. p. 11, lines 8-10, 32-34; p. 13, lines 21-24; Tr. p. 226, 227), the testimony was accurately descriptive of what was said, and its use in the context of the three persons involved was neither unusual nor unreciprocated.

f) While purporting to adopt and apply the lingering, distorting effect on election conditions test of Gissel (and, albeit sub silentio, Steel-Fab, Inc., 212 NLRB No. 25) (Dec. p. 19, lines 1-36), the ALJ ignored the actualities of the case, i.e., that with the prompt reinstatement of Colon and Vega without loss of pay in circumstances making the Union their potent and effective champion, nothing done by Zim in the way of prior unfair labor practices could possibly distort the election conditions then and thereafter prevailing.

g) If anything has had the tendency to impair the conditions of a fair election, such impairment results solely from the proposed bargaining order which, in effect, confirms the Regional Director's wrongful vacatur of his own Decision and Order Directing Election and his dismissal of the RM petition filed after that vacatur.

(14) The policy enunciated by the ALJ subverts and denigrates the preferred method of representation proceedings under the Act for determining employee choice, and destroys the rights of the employees, in the context of the established procedures of a representation proceeding, to vote their preference among their section 7 rights by secret ballot.

(15) The nature of Vega's layoff, whether temporary with prospect of early recall or indefinite with dim chance for early recall, was fully litigated in the representation proceeding, and the ALJ ignores the fact that Zim took the litigation chance that the Regional Director would rule the layoff temporary.

(16) The Decision results in trampling on the right of the office clerical employee Linda Balmeo to engage or not engage in concerted activities expressed through her vote in a free election, contrary to the mandate of N. L. R. B. v. Savair Mfg. Co. (1974) 414 U.S. 270, 278, on the basis of a fictitious "agreement" where, in fact, the parties, other than through the Union's representation petition, "never voluntarily agreed upon any mutually acceptable and legally permissible means * * *", Linden Lumber Division v. N. L. R. B., 12/23/74, 43 Law Week 4097, ft. 9.

(17) The Decision distorts the position of Zim in the context of an ongoing representation proceeding and its procedures (Dec. p. 9, lines 13-17, 32-49; p. 12, 13 ft. 14), viz., that when 2 warehouse and 1 office clerical employee were on payroll, Zim could litigate the conditions calling for her inclusion in or exclusion from the bargaining unit demanded, or, alternatively, vide Savair Mfg. Co., for her to vote her preference for inclusion in or exclusion from the larger unit; and that, when the payroll consisted of one warehouse worker and one office clerical, Zim conceded the appropriateness of the overall unit so that an election might be had, the numbers voting, whether 2 or 3 being dependent on how the Regional Director would rule on the nature of Vega's layoff.

(18) Other errors of the ALJ are:

a) There was no conflict in the testimony between Colon and Zell regarding a promise made in December 1973 to enroll Colon in the company's Blue Cross-Blue Shield program when it opened for new enrollment on July 1st, 1974 (Dec. p. 4, lines 12-17). Colon ultimately testified that such a promise was made (Tr. p. 54, lines 4-8).

b) Zell did not make "some sort of substitute offer" to Colon on March 28, 1974 (Dec. p. 4, lines 27-33). He reminded Colon of his 1973 promise of July 1974 enrollment in Blue Cross-

Blue Shield (Tr. p. 122-125) and stated he had been working on some company pension plans; and Colon admitted as much (Tr. p. 135, lines 19-25; p. 39, lines 19-23; p. 40, lines 1-7; p. 54, lines 4-8 - " * * * in November * * * now that I remember well, he told me that the next time that the Medicaid would come in, he would seek to get me on the medical benefits.") Vega confirmed, on the basis of Colon's report to him, that "Zell had offered us a health plan * * *" (Tr. p. 78, lines 23-25; p. 79, line 1).

c) In characterizing the discharges of Colon and Vega on April 4, 1974 as a "temporary layoff" (Dec. p. 7, lines 10, 11).

d) The distortion of Zim's position regarding the office clerical employee after Vega's layoff as an opportunity that should be given to her to choose whether "she wishes to be included in the bargaining unit" (Dec. p. 7, lines 36-39), when the actual company position was that Colon and Balmeo were entitled to vote while Vega, because of his indefinite layoff, was not.

e) Misstating Zell's testimony about a company decision to lay off Vega as being made in January rather than February 1974 (Dec. p. 13, lines 8-11; R. Tr. p. 34; lines 1-19; p. 167, lines 1-8).

f) In view of the fact that cards were never shown to Zim until the unfair labor practice hearing, it distorts the impact upon the employer for the ALJ to say that the office clerical employee never signed a card (Dec. p. 13, lines 38-40), while omitting to mention that, at the representation hearing, Passman claimed that the Union had three employees in membership before it approached Zim (Tr. p. 93, lines 12-14).

g) Misstating the date of Zim's retention of counsel as April 3, rather than April 4, 1974 (Dec. p. 18, fn. 21; Tr. p. 149, lines 24, 25; p. 150, lines 1-5).

19. Zim excepts to the whole of the Decision relating to "The Remedy" (Dec. p. 20, lines 5-29), and respectfully suggests that

while, ordinarily, the violations of sections 8(a)(1) and (3) committed on the morning of April 4, 1974 justify for a cease and desist remedy with 60 days posting, in view of the prompt reinstatement with full backpay and the inordinate delay which these proceedings have created in the holding of an election, the complaint ought to be dismissed in its entirety.

20. Zim excepts to the Conclusions of Law in the Decision herein numbered 4 through 10, and to the whole of the recommended Order with the exception of paragraph 3 of the order (Dec. p. 21-23).

Respectfully submitted,

Dated: New York, N.Y.
February 12, 1975.

/s/ Milton Horowitz
Attorney for Respondent
15 Park Row
New York, N.Y. 10038
(212) Cortlandt 7-0606

[Dated 6/6/75]

[D-9928
New York, N. Y.]

* * * * *

DECISION AND ORDER

On January 6, 1975, Administrative Law Judge Sidney D. Goldberg issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

1. The Administrative Law Judge finds that Respondent violated Section 8(a)(3) and (1) when it discriminatorily laid off Nelson Vega. Respondent excepts. We find merit in this exception.

Vega was laid off on April 11, 1974. Respondent contends that the layoff resulted from a lack of work at its warehouse. Respondent's supervisor, Martin Zell, testified without contradiction that because of a reduction in shipments to and from its warehouse Respondent decided in February 1974 that it would lay off one of its two warehousemen. It further decided that it would effectuate the layoff following the receipt of a heavy shipment of towels expected to arrive in the latter part of March and following the heavy work of restacking, rearranging, and repacking merchandise, etc., preparatory for its annual April inventory. A comparison of the shipments to and from the warehouse establishes that there was a drastic falloff

of both receipts and shipments during the first 3 months of 1974 as compared to the previous 3-month period or a comparable 3-month period in 1973.^{1/} Only in March was a large quantity received as a result of the large shipment cited by Respondent as part of the reason for retaining Vega until April.

The Administrative Law Judge agrees that Respondent had legitimate economic reasons for laying off Vega as of May 17 but finds that the layoff was accelerated because of Vega's known support for the Union and because the layoff would result in a reduction of the unit size to two employees with only one of the two known to be a union supporter.^{2/}

The timing of the discharge, only a week after Respondent admittedly discharged Vega in violation of 8(a)(3) and (1) and then reinstated him, along with the other unfair labor practices found herein, does raise some suspicions as to Respondent's motivation.

1/ The record shows the following for these periods:

1973

	<u>Pounds in</u>	<u>Cartons out</u>
Jan.	22,550	321
Feb.	13,601	198
March	23,552	138
	-	
	-	
	-	
Oct.	28,022	171
Nov.	17,945	173
Dec.	28,903	128

1974

Jan.	0	119
Feb.	855	100
March	28,121	90

2/ The Administrative Law Judge does not set forth the basis upon which he chose May 17 as being the earliest date that Respondent had economic justification for laying off Vega.

However, Respondent has presented a full business justification for the timing of the discharge. The record clearly indicates that a heavy shipment was received in March and that Respondent did have work in preparation for the inventory during the first 2 weeks in April. Further, the evidence indicates that thereafter there was not sufficient work for more than one man. Under these circumstances, we conclude that the General Counsel has not met his burden of establishing that the layoff was unlawful.

Accordingly, we shall, and hereby do, dismiss this allegation of the complaint.

2. The Administrative Law Judge finds that Respondent became obligated to bargain with the Union when Zell questioned two of the three unit employees and received affirmative statements of support, since at that time Respondent knew a clear majority of the employees wished to have the Union represent them. Respondent contends that it did not engage in the type of questioning or polling which raises a bargaining obligation. We agree.^{3/}

On April 4, 1974, Zell received in the mail a letter from the Regional Director enclosing a copy of the representation petition filed by the Union the previous day. When employee Israel Colon came to work a few minutes later, Zell confronted him with the petition and pointed out that the petition had been filed the previous day despite Zell's understanding that the two employees (Colon and Vega) had promised the matter would be "straightened out" -- a reference to an earlier discussion Zell had with the employees with regard to the Union. Zell shouting in anger continued saying the petition made it necessary for him to retain an attorney costing "thousands of

^{3/} Unlike his colleagues, Member Fanning would affirm the Administrative Law Judge's finding that Respondent became obligated to bargain with the Union when Zell questioned two of the three unit employees and received affirmative statements of support. Accordingly, he would adopt the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(5) and (1) when it refused to do so.

dollars." Colon pounded the desk and said he wanted the Union. At this Zell said, "If you want the Union you are fired." Zell then shouted to employee Vega, "Nelson, do you want the Union?" When Vega answered that he did, Zell said, "You are fired too, get out." After consulting with an attorney, Respondent reinstated the employees the next day with no loss of pay.^{4/}

In Sullivan Electric Company, 199 NLRB 809 (1972), the Board held that when an employer unilaterally undertakes to determine the union's majority or minority status under conditions of his own choosing as an alternative to an election the employer cannot thereafter disclaim the results simply because it finds them distasteful. In our opinion this angry confrontation between Zell and the employees did not constitute the considered selection of an alternative to an election contemplated by Sullivan Electric. Zell simply engaged in a confrontation with the employees. There is no indication that he set out to determine the Union's majority or minority status. Only one of the three unit employees was questioned. Another volunteered his support for the Union in response to Zell's angry comments. Clearly, Respondent was not seeking to determine the Union's majority or minority status by polling the employees as an alternative to an election. Under these circumstances, we shall not adopt so much of the Administrative Law Judge's Decision as directs Respondent to bargain on this basis.

3. In the alternative, the Administrative Law Judge finds that Respondent's 8(a)(1) and (3) unfair labor practices require that Respondent be ordered to bargain with the Union.^{5/} We agree.

As fully detailed by the Administrative Law Judge, Respondent here unlawfully offered medical, pension, and other benefits to employees on the condition that they withdraw support from the Union

^{4/} Employer admitted that the discharges violated Sec. 8(a)(3) and (1).

^{5/} N. L. R. B. v. Gissel Packing Co., Inc., 395 U.S. 575 (1969).

and coercively interrogated employees concerning their support for the Union. Respondent discharged Colon and Vega, under the conditions described above, in violation of Section 8(a)(3) and (1). Respondent contends that these discharges do not stand in the way of a free election because, after consulting with an attorney, Respondent reinstated the employees without any loss in pay. However, as we have held, the effect of such discharges is not so easily eradicated. Vernon Devices, Inc., 215 NLRB No. 62 (1974). An employer's demonstrated willingness to employ extreme measures to defeat a union cannot help but have a lasting and telling effect. Employees will certainly understand and remember the harsh treatment visited on them as a result of asserting their rights and may draw back from again asserting those rights. A free and fair election in these circumstances is unlikely.^{6/}

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that Respondent, Zim Textile Corp., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Administrative Law Judge's recommended Order as herein modified:

^{6/} For the reasons stated by the majority in Steel-Fab, Inc., 212 NLRB No. 25 (1974), we do not adopt the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(5) of the Act, but rather enter the bargaining order as a remedy for the serious unfair labor practices committed by Respondent. Member Fanning agrees that a free and fair election in these circumstances is unlikely. He, for the reasons set forth in his dissent in Steel-Fab, would find the violation of Sec. 8(a)(5) and base the bargaining order on that section as well as Sec. 8(a)(1).

1. Delete paragraph 1(b) and reletter the following paragraphs consecutively.

2. Substitute the following for paragraph 2(a):

"(a) Upon request, meet and bargain with District 65, Distributive Workers of America, as the exclusive representative of all the employees in the appropriate bargaining unit, and, if any understanding is reached, embody it in a signed agreement. The appropriate unit is :

All shipping, receiving, stock, office clerical, production, and maintenance employees at the New York premises, exclusive of guards, watchmen, and all supervisors as defined in Section 2(11) of the National Labor Relations Act, as amended."

3. Delete paragraph 2(b) and reletter the following paragraphs consecutively.

4. Substitute the attached notice for the Administrative Law Judge's notice.

IT IS FURTHER ORDERED that the complaint, as to all allegations not found to be violations of the Act, be dismissed.

Dated, Washington, D. C. June 6, 1975

John H. Fanning, Member

Ralph E. Kennedy, Member

John A. Penello, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial in which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the law and has ordered us to post this notice.

The National Labor Relations Act, as amended, gives all employees the following rights:

- To organize themselves
- To form, join, or support unions
- To bargain as a group through a representative they choose
- To act together for collective bargaining or other mutual aid or protection
- To refrain from any or all such activities.

In recognition of these rights, we hereby notify our employees that:

WE WILL, upon request, bargain collectively with said Union as exclusive representative of said employees and, if an agreement is reached, embody it in a signed contract. The appropriate unit is:

All shipping, receiving, stock, office clerical, production, and maintenance employees at this company's New York premises, exclusive of guards, watchmen, and all supervisors as defined in Section 2(11) of the National Labor Relations Act, as amended.

WE WILL NOT make offers of benefit to induce our employees not to engage in concerted activities; WE WILL NOT coercively interrogate them concerning their membership in or support for the said labor organization; WE WILL NOT discharge or prematurely lay off any employee to discourage their membership in the said labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by the National Labor Relations Act, except insofar as membership in a labor organization may be required pursuant to a collective-bargaining contract not inconsistent with Section 8(a)(3) of said Act.

ZIM TEXTILE CORP.

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 36th Floor Federal Building, 26 Federal Plaza, New York, New York 10007, Telephone 212-264-0306.

GENERAL COUNSEL'S EXHIBIT NO. 1

* * * * *

COMPLAINT AND NOTICE OF HEARING

It having been charged by District 65, Distributive Workers of America, herein called District 65, that Zim Textile Corp., herein called Respondent has engaged in, and is engaging, in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U. S. C. , Sec. 151, et seq., herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director, Region 2, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations - Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1(a) The Charge in this proceeding was filed by District 65 on May 6, 1974, and served by registered mail upon Respondent on or about May 6, 1974.

(b) The First Amended Charge in this proceeding was filed by District 65 on May 10, 1974, and served by registered mail upon Respondent on or about May 10, 1974.

2(a) Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New York.

(b) At all times material herein, Respondent has maintained an office and place of business at 6 East 32nd Street, in the City and State of New York where it is, and has been at all times material herein, engaged in the sale and distribution of blankets, bedspreads, towels, linens and related products on a wholesale basis.

(c) During the past year which period is representative of its annual operations generally, Respondent, in the course and conduct of

its business, towels and linens and other goods and materials valued in excess of \$50,000, of which goods and materials valued in excess of \$50,000 were transported and delivered to its place of business in interstate commerce directly from states of the United States other than the state in which it is located.

3. Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

4. District 65 is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

5. All shipping, receiving, stock, office clerical, production and maintenance employees of Respondent, employed at its plant, exclusive of guards, watchmen and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. At all times material herein Martin Zell is, and has been, general manager of Respondent acting on its behalf and a supervisor thereof within the meaning of Section 2(11) of the Act.

7(a) In or about November and December 1973, and January 1974, the exact dates presently unknown, employees in the unit described above discussed with Martin Zell improvements in their working conditions and advised him that they would seek Union representation if their working conditions were not improved.

(b) In or about November and December 1973 and January 1974, the exact dates presently unknown, at the Respondent's premises, during the discussions described above in subparagraph (a) Martin Zell threatened the aforesaid employees with discharge if they attempted to secure union representation.

8. On or about February 7, 1974 a majority of the employees of Respondent, in the unit described above in paragraph 5, designated and selected District 65 as their representative for the purposes of

collective bargaining with Respondent and at all times since said date, Respondent by virtue of Section 9(a) of the Act, has been and is now the exclusive representative of all the employees in said unit for the purposes of collective bargaining.

9. On or about March 28, 1974, Respondent requested Respondent to recognize and bargain with it as the exclusive collective bargaining representative of Respondent's employees in the unit described above in paragraph 5 with respect to rates of pay, wages, hours of employment and other terms and conditions of employment of such employees.

10. Since on or about March 28, 1974 Respondent has refused to recognize or bargain with District 65 as the exclusive collective bargaining representative of Respondent's employees in the unit described above in paragraph 5.

11. On or about April 3, 1974 District 65 filed a petition in Case No. 2-RC-16475 seeking an election among the employees of Respondent in the unit described above in paragraph 5.

12(a) On or about April 4, 1974, Respondent by Martin Zell, at Respondent's premises, interrogated its employees concerning the employees' membership in, activities on behalf of, and sympathy in and for District 65.

(b) As a result of such interrogation Respondent determined that District 65, represented a majority of Respondent's employees in the unit described above in paragraph 5.

13(a) On or about April 4, 1974, Respondent by Martin Zell discharged its employees Israel Colon and Nelson Vega.

(b) Respondent discharged its employees Israel Colon and Nelson Vega because said employees joined and assisted District 65.

(c) On or about April 5, 1974 Respondent reinstated to their former positions of employment, Israel Colon and Nelson Vega.

14(a) On or about April 11, 1974, Respondent, by Martin Zell, at Respondent's premises, informed its employees that they could absent themselves from work on Good Friday but that they could not be paid for that day.

(b) Prior to April 11, 1974 Respondent had permitted its employees to absent themselves from work on Good Friday but had paid them for that day.

(c) Respondent altered and changed its practice of granting Good Friday as a paid holiday because its employees joined and assisted District 65.

15(a) On or about April 11, 1974, Respondent by Martin Zell permanently laid off its employee Nelson Vega, and since said date has failed and refused to recall or reinstate him to his former position of employment.

(b) Respondent laid off and thereafter failed and refused to recall or offer to recall its employee Nelson Vega, as described above in subparagraph (a) because said employee joined and assisted District 65.

16. Respondent engaged in the conduct described above in paragraphs 10, 12, 13, 14 and 15 in order to undermine the District 65 and to destroy its majority status among such employees.

17. By the acts and conduct of Respondent described above in paragraphs 7, 10 and 12 through 16 Respondent has precluded the holding of a fair and free election amongst the employees in the unit described above in paragraph 5.

18. By the acts described above in paragraphs 7, 10 and 12 through 16 and by each of said acts, Respondent interfered with, restrained and coerced, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

19. By the acts described above in paragraphs 12 through 15 and by each of said acts, Respondent discriminated and is discriminating in regard to the hire and tenure and terms and conditions of employment of its employees, thereby discouraging membership in a labor organization, and thereby engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and Section 2(6) and (7) of the Act.

20. By the acts described above in paragraphs 10 and 12 through 16 and by each of said acts, Respondent refused to bargain collectively and is refusing to bargain collectively with the representative of its employees, and thereby engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act.

21. The acts of Respondent described above in paragraphs 7, 10 and 12 through 16 occurring in connection with the operations of Respondent described above in paragraphs 2 and 3, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

PLEASE TAKE NOTICE that on the 10th day of July 1974, at 11:00 a. m., at 26 Federal Plaza, 36th Floor, in the City and State of New York, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the Regional Director, Region 2, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to the said Complaint within ten (10) days from the service thereof, and that unless it does so all of the allegations in the Complaint

shall be deemed to be admitted by it to be true and may be so found by the Board. Immediately upon the filing of its answer, Respondent shall serve a copy thereof on each of the other parties.

Form NLRB-4668, Statement of Standard Procedure in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases is attached.

Dated at New York, New York this 6th day of June 1974.

/s/ Sidney Danielson
Regional Director
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10007

SUMMARY OF STANDARD PROCEDURES IN FORMAL
HEARINGS HELD BEFORE THE NATIONAL LABOR
RELATIONS BOARD IN UNFAIR LABOR PRACTICE
PROCEEDINGS PURSUANT TO SECTION 10 OF THE
NATIONAL LABOR RELATIONS ACT, AS AMENDED

The hearing will be conducted by an Administrative Law Judge of the National Labor Relations Board. He will preside at the hearing as an independent, impartial trier of the facts and the law and his decision in due time will be served on the parties. His headquarters are either in Washington, D. C. or San Francisco, California.

At the date, hour, and place for which the hearing is set, the Administrative Law Judge, upon the joint request of the parties, will conduct a "prehearing" conference, prior to or shortly after the opening of the hearing, to assure that the issues are sharp and clear-cut; or he may, on his own initiative, conduct such a conference. He will preside at any such conference, but he may, if the occasion arises, permit the parties to engage in private discussions. The conference will not necessarily be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record -- for example, in the form of statements of position, stipulations, and concessions. Except under unusual circumstances, the Administrative Law Judge conducting the prehearing conference will be the one who will conduct the hearing; and it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference. No prejudice will result to any party unwilling to participate in or to make stipulations or concessions during any prehearing conference.

(This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an effort to narrow the issues.)

Parties may be represented by an attorney or other representative and present evidence relevant to the issues.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the Administrative Law Judge for his approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the Administrative Law Judge specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the Administrative Law Judge and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The Administrative Law Judge will allow an automatic exception to all adverse rulings, and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies shall also be supplied to other parties. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy before the close of hearing. In the event such copy is not submitted, and the filing thereof has not for good reason shown been waived by the Administrative Law Judge, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. In the absence of a request,

the Administrative Law Judge may himself ask for oral argument, if at the close of the hearing he believes that such argument would be beneficial to his understanding of the contentions of the parties and the factual issues involved.

Any party shall also be entitled upon request made before the close of the hearing, to file a brief or proposed findings and conclusions, or both, with the Administrative Law Judge who will fix the time for such filing.

Attention of the parties is called to the following requirements laid down in Section 102.42 of the Board's Rules and Regulations with respect to the procedure to be followed before the proceeding is transferred to the Board:

No request for an extension of time within which to submit briefs or proposed findings to the Administrative Law Judge will be considered unless received by the Chief Administrative Law Judge in Washington, D. C. (or in cases under the San Francisco, California branch office of the Division of Judges, the Associate Chief Administrative Law Judge in charge of such office) at least 3 days prior to the expiration of time fixed for the submission of such documents. Notice of request for such extension of time must be served simultaneously upon all other parties, and proof of such service furnished to the Chief Administrative Law Judge or Associate Chief Administrative Law Judge as the case may be. All briefs or proposed findings filed with the Administrative Law Judge must be submitted in triplicate, and may be in typewritten, printed, or mimeographed form, with service upon the other parties.

In due course the Administrative Law Judge will prepare and file with the Board his decision in this proceeding, and will cause a copy thereof to be served upon each of the parties. Upon filing of the said decision, the Board will enter an order transferring this case to itself, and will serve copies of that order, setting forth the date

of such transfer, upon all parties. At that point, the Administrative Law Judge's official connection with the case will cease.

The procedure to be followed before the Board from that point forward, with respect to the filing of exceptions to the Administrative Law Judge's Decision, the submission of supporting briefs, requests for oral argument before the Board, and related matters, is set forth in the Board's Rules and Regulations, Series 8, as amended, particularly in Section 102.46, and following sections. A summary of the more pertinent of these provisions will be served upon the parties together with the order transferring the case to the Board.

Adjustments or settlements consistent with the policies of the Act reduce government expenditures and promote amity in labor relations. Upon request, the Administrative Law Judge will afford reasonable opportunity during the hearing for discussions between the parties if adjustment appears possible, and may himself suggest it.

ANSWER

Respondent ZIM TEXTILE CORP., by its attorney MILTON HOROWITZ, for its Answer to the Complaint herein, alleges as follows:

1. Denies each and every allegation contained in paragraphs numbered 7(a) and (b), 9, 14(b) and (c), 15(b), 17, 18, 19, 20 and 21 of the Complaint.

2. As to paragraph 5 of the Complaint, admits the appropriateness of the unit therein described but asserts the optional right of the Employer Zim Textile Corp. (hereinafter "Zim"), in representation proceedings, to have its office clerical employee separately polled in a "Globe" election for self inclusion in such a unit.

3. Denies each and every allegation contained in paragraph numbered 6 of the Complaint, except admits that Martin Zell (hereinafter "Zell") is a supervisor of Zim within the meaning of the Act.

4. As to paragraph 8 of the Complaint, denies that it has knowledge or information sufficient to form a belief as to the alleged designation and selection of District 65 as bargaining representative by employees of Zim, denies that such designation, whenever made, uncommunicated and undemonstrated to Zim, constitutes District 65 as the exclusive bargaining representative of Zim's employees, and further denies, in the circumstances here presented, that District 65 can be deemed such exclusive bargaining representative unless certified as such following an election.

5. As to paragraph 10 of the Complaint, denies any wrongful refusal to bargain, and further alleges Zim's good faith participation in a representation proceeding initiated by District 65 as petitioner by petition dated April 3, 1974, No. 2-RC-16475 (as

alleged in paragraph 11 of the Complaint), and then as now presenting legitimate questions concerning representation to be resolved by secret ballot election.

6. As to paragraph 12(b) of the Complaint, admits that, inferentially, Zell then knew that employees Colon and Vega constituted a majority of a group of employees including the office clerical employee, but denies that such knowledge was motivational in his actions described in paragraphs 13(a) and 13(b) of the Complaint.

7. As to paragraph 13(b) of the Complaint, denies each and every allegation thereof except admits that Zell discharged Colon and Vega impulsively and in anger for what he deemed to have been a deception practiced upon him by said employees with respect to joining and assisting District 65.

8. As to paragraph 13(c) of the Complaint, denies each and every allegation thereof except admits that on advice of counsel then retained, in the afternoon of April 4, 1974 Zell requested District 65 representative Ralph Passman to present Colon and Vega for immediate reinstatement, and they accordingly reported for work the next day without suffering any loss of pay whatsoever.

9. As to paragraph 14(a) of the Complaint, denies each and every allegation thereof except admits that when Colon and Vega advised Zell on the morning of April 11, 1974 that they were taking the following day, Good Friday, off, he advised them that it was a working day, not a holiday, and that if they did take the day off, it would be on their own time.

10. As to paragraph 15(a) of the Complaint, denies each and every allegation thereof except admits that at the end of the working day of April 11, 1974, Zim laid off employee Nelson Vega indefinitely for lack of work occasioned by the marked decline in Zim's business, advised him he would be recalled when work became

available, and took the address data necessary for getting in touch with Vega; Vega ascribed lack of work as the reason for the layoff in his application for unemployment insurance benefits, and Zim confirmed Vega's statement.

11. With respect to paragraph 16 of the Complaint, denies each and every allegation thereof, and more specifically denies that Zim's action of prompt reinstatement with full backpay, as alleged in paragraph 13(c) of the Complaint, was intended to or had the effect of undermining District 65 in any way.

FIRST DEFENSE

12. Not until the filing of the petition in representation proceedings on June 3rd, 1974, received by Zim on June 4th, 1974, had District 65 voiced a demand for exclusive bargaining rights for a unit inclusive of office clerical employees.

13. Prior to April 3rd, 1974, if the allegations of paragraph 7(a) of the Complaint are to be credited, some of the employees of Zim initiated discussions and engaged in a course of individual bargaining with Zim for improvement in their working conditions using as leverage the statement that they might otherwise seek union representation.

14. While there had been some discussion, notably about wage increases and medical benefit insurance considerably before the appearance of District 65 on the scene, on March 28, 1974 with Colon and on March 29, 1974 with Colon and Vega, extended discussions were had by Zell covering Employer offers of benefits in response to what Colon and Vega said they wanted. After private conference between Colon and Vega, the said employees announced that they really didn't want the Union as long as they could get the Employer benefits offered.

15. During the mid-day hours of March 29, 1974 Colon and Vega absented themselves from Zim's premises with the avowed

purpose of going down to District 65 to let the Union know they were no longer interested and to drop the "filing" which District 65 representative Ralph Passman had mentioned when he was at Zim's premises on March 28, 1974. Colon and Vega returned at about 2 P. M. and told Zell that everything had been "taken care" of.

16. Zell spoke with District 65 representative Ralph Passman on the telephone on April 1, 1974, was advised by Mr. Passman that it was "too late" to prevent the "filing", but that the employees could vote "no" in the election if they did not want the Union.

18. When District 65's representation petition arrived at Zim's premises on the morning of April 4, 1974, Zell immediately called the Regional Director of Region 2 and was advised to retain counsel for advice; when Colon and Vega reported for work that morning, Zell immediately discharged them and refused reinstatement when they came back a few hours later with District 65 representatives Passman and Pagan. That afternoon Zim retained counsel and called Mr. Passman arranging for reinstatement of Colon and Vega, who reported in the following day without suffering any loss of pay.

19. From the foregoing, it is obvious that Zell was inexperienced with the legal aspects of the representational process and the requirements of the Act. Since Zim's retention of counsel, no unfair labor practices have been committed by Zim.

20. Such unfair labor practices as were committed from the time of the filing of the representation petition were isolated in a single incident of April 4, 1974 and promptly voluntarily remedied in such a way as to bolster rather than undermine the adherence of employees to District 65.

21. District 65 having proceeded initially upon a representation petition wherein a bargaining unit inclusive of office clerical employees was demanded should not be designated the exclusive bargaining representative unless and until certified as such following a representation election.

SECOND DEFENSE

22. After all of the events and acts, inclusive of the lay-off of Nelson Vega at the end of the working day of April 11, 1974, District 65 participated in both the informal conference and the formal hearing in said representation proceedings wherein Zim acceded to both the holding of an election and the bargaining unit requested by District 65, and where the only issue for determination by the Regional Director was whether Vega's layoff was temporary with a reasonable expectancy of recall in the near future or indefinite. Only after the issuance of the Regional Director's Order and Direction of Election with the Regional Director's findings of the nature of Vega's layoff, did District 65 file its original charge herein which in no respect challenged the layoff.

23. By its aforesaid participation in the representation proceedings, coupled with Zim's self-remedying of its discharge action of April 4, 1974 and its proper conduct at all times thereafter, District 65 has waived any rights in this proceeding to a bargaining order without an election.

WHEREFORE, Respondent respectfully demands that the Complaint herein be dismissed in its entirety.

Dated: New York, N. Y.
June 17, 1974.

/s/ Milton Horowitz
Attorney for Respondent,
Zim Textile Corp.
15 Park Row
New York, N. Y. 10038
(212) COrtlandt 7-0606

GENERAL COUNSEL'S EXHIBIT NO. 2 A/B

DISTRICT 65 1-1

Wholesale, Retail, Office and Processing Union
13 Astor Place, New York, N. Y. 10003
673-5120

Do Not Write in This Space

Area 2 Local 1
Organizer 1/1/74
Book No. 3

Print Name C. COLON ISRAEL
Last Name First Name
Address 1871 4th Ave #4 City Brooklyn Zip 10460
Social Security No. 1096 36 3568 Home Phone 563-2212
Firm ZIM Textile Dept. Shipping
Address of Firm 6-10 E 32 St. Employed since 5/73
Work you do Shipping Clerk Salary \$135.00

I hereby accept membership in DISTRICT 65 and of my own free will hereby authorize DISTRICT 65, its agents or representatives to act for me as a collective bargaining agency in all matters pertaining to rates of pay, wages, hours, or other conditions of employment.
I also agree to abide by all the rules and regulations of the union.

Date: Feb 2/74 Signature C. Colon

2A

DISTRICT 65 1-2

Wholesale, Retail, Office and Processing Union
13 Astor Place, New York, N. Y. 10003
673-5120

Do Not Write in This Space

Area 2 Local 1
Organizer 1/1/74
Book No. 3

Print Name U. EGAT Nelson Tr
Last Name First Name
Address 1787 Inwood Ave City Brooklyn Zip 10452
Social Security No. 601 42 7704 Home Phone 563-2212
Firm ZIM TEXT. COMP Dept. SHIPPING
Address of Firm 6-10 E 32 ST Employed since 10/26/73
Work you do SHIPPING CLERK Salary \$110.00

I hereby accept membership in DISTRICT 65 and of my own free will hereby authorize DISTRICT 65, its agents or representatives to act for me as a collective bargaining agency in all matters pertaining to rates of pay, wages, hours, or other conditions of employment.
I also agree to abide by all the rules and regulations of the union.

Date: 2/7/74 Signature Nelson

NATIONAL LABOR RELATIONS BOARD

Docket No. CC-2272B OFFICIAL EXHIBIT NO. CC-2272B

Disposition

Received 1/1/74
Received 1/1/74
Received 1/1/74

In the matter of 2

Date 2/7/74 Filed 4

No. Pages

GENERAL COUNSEL
Exhibit No. 2 A/B

GENERAL COUNSEL'S EXHIBIT NO. 3

Form NLRB-502
(11-6-64)UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARDForm Approved
Budget Bureau No. 64-R00214

REGION 2

PETITION

DO NOT WRITE IN THIS SPACE

CASE NO. 2-DC-16415
DATE FILED 4/13/74

INSTRUCTIONS: Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employee concerned is located. If more space is required, attach additional sheets, numbering them accordingly.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act:

1. Purpose of this Petition: NEW YORK RECOGNITION 205A Red and a charge under Section 8(b)(7) of the Act has been filed involving the Employee named herein. The statement indicates the description of the type of petition shall not be deemed made.

(Check one)

☒ **RECOGNITION OF REPRESENTATIVE** - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.☐ **RM REPRESENTATION (EMPLOYER PLEADING)** - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.☐ **RE-DETERMINATION** - A substantial number of employees assert that the current or currently recognized bargaining representative is no longer their representative.☐ **WITHDRAWAL OF UNION SECURITY AGREEMENT** - Three percent (3%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.☐ **CLERICAL CLARIFICATION** - A labor organization is currently recognized by employer, but petitioner seeks clarification of placement of certain employees of Employer.☐ **AMENDMENT OF CERTIFICATION** - Petitioner seeks amendment of certification issued in Case No. _____.

Attach statement describing the specific amendment sought.

2. NAME OF EMPLOYER

ZIM TEXTILE COMPANY

EMPLOYER REPRESENTATIVE TO CONTACT

PHONE NO.

3. ADDRESS OF ESTABLISHMENT(S) INVOLVED (Street and number, city, State and ZIP Code)

6 EAST 32nd STREET, NEW YORK, N.Y. 10016

4a. TYPE OF ESTABLISHMENT (Factory, store, wholesaler, etc.)

WHOLESALE

4b. STATE PRINCIPAL PRODUCT OR SERVICE

BLANKETS - BEDSPREADS

5. Unit Involved (The U.C. petition describes PRESENT bargaining unit and attach description of proposed certification.)

Included:

**SHIPPING - RECEIVING - STOCK - OFFICE
PRODUCTION & MAINTENANCE**

Excluded:

SUPERVISORS UNDER THE ACT & GUARDS

6a. NUMBER OF EMPLOYEES IN UNIT

PRESENT **3**

PROPOSED (BY U.C.):

6b. IS THIS PETITION SUPPORTED BY 30% OR MORE OF THE EMPLOYEES IN THE UNIT?

☒ YES ☐ NO

*Not applicable in RM, U.C. and AC

(If you have checked box "b" above, check and complete FOLLOWING item "a" or "b" whichever is applicable)

7a. ☒ Request for recognition as Bargaining Representative was made in April 3rd, 1974 and Employer declined recognition on or about April 27th, 1974 (Month, day, year) (If no reply received in state)7b. ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

8. Recognized or Certified Bargaining Agent (If there is none, so state)

NAME

AFFILIATION

ADDRESS

DATE OF RECOGNITION OR CERTIFICATION

9. DATE OF EXPIRATION OF CURRENT CONTRACT, IF ANY (Show month, day and year)

10. IF YOU HAVE CHECKED BOX 7a OR 7b ABOVE, SHOW HERE THE DATE OF EXECUTION OF AGREEMENT GRANTING UNION SHOP (Month, day, and year)

11a. IS THERE NOW A STRIKE OR PICKETING AT THE EMPLOYER'S ESTABLISHMENT(S) INVOLVED?

YES NO

11b. IF SO, APPROXIMATELY HOW MANY EMPLOYEES ARE PARTICIPATING?

11c. THE EMPLOYER HAS BEEN PICKETED BY OR ON BEHALF OF

(If yes, name)

A LABOR

ORGANIZATION OF

(Insert address)

SINCE

(Month, day, year)

12. ORGANIZATIONS OR INDIVIDUALS OTHER THAN PETITIONER (AND OTHER THAN THOSE NAMED IN ITEMS 8 AND 11c) WHICH HAVE CLAIMED RECOGNITION AS REPRESENTATIVES AND OTHER ORGANIZATIONS AND INDIVIDUALS KNOWN TO HAVE A REPRESENTATIVE INTEREST IN ANY EMPLOYEES IN THE UNIT DESCRIBED IN ITEM 5 ABOVE (If none, so state)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM (Required only if Petition is filed by Employer)

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

DISTRICT 65 DISTRIBUTIVE WORKERS OF AMERICA

By

RALPH PASSMAN**GENERAL ORGANIZER**Address **13 Astor Place, New York, N.Y. 10003****673-5120**

WILLFULLY FALSE STATEMENT ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GENERAL COUNSEL
Exhibit No. 3

GENERAL COUNSEL'S EXHIBIT NO. 4

ZIM TEXTILE CORPORATION

and

DISTRICT 65, DISTRIBUTIVE WORKERS
OF AMERICAEmployer ^{1/}

Petitioner

Case No. 2-RC-16475

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
2. The labor organization involved claims to represent certain employees of the Employer.
3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

1/ The name of the Employer appears as corrected at the hearing.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: ^{2/}

All shipping, receiving, stock, office clerical, production and maintenance employees employed by the Employer at its 6 East 32nd Street location, excluding guards, watchmen and supervisors as defined in the Act. ^{3/}

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election

^{2/} The Employer, a wholesale distributor of dry goods, is in agreement that the warehouse and office clerical unit sought by Petitioner, is appropriate.

^{3/} The parties dispute the eligibility to vote of Nelson Vega, a warehouse employee laid off on April 11, 1974. Petitioner contends his layoff was temporary while the Employer asserts that it was of indefinite duration. The record establishes that since 1970 the unit complement has consisted of one office clerical employee and either one or two shipping and receiving employees, depending on the amount of such work required to be done at any given time. These two jobs have been filled in this period of time by eight individuals, and there is no pattern of recall of those employees who left employment. In only one case, did an employee return after his termination. It appears that for some months there has been a general decline in business and the Employer testified further to an anticipated loss of a major supplier. As a consequence, Vega was laid off and was told that business was slow but that he would be called back when needed.

The test for determining eligibility of a laid-off employee is whether he "had a reasonable expectancy of recall in the near future as of the date of the election." Leach Corporation, 121 NLRB 772, 773. The Board has also noted that in the absence of a specific indication of a recall, vague statements as to the "chance" or "possibility" of the laid-off employee returning do not provide an adequate basis for concluding that the employee had a reasonable expectancy of reemployment. Tomadur, Inc., 196 NLRB 706. In view of the foregoing, I find that the

to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees

- 3/ (Continued) circumstances of Nelson Vega's layoff are such that he does not have a reasonable expectancy of reemployment and that he therefore is not eligible to vote in the election directed herein.
- 4/ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236; N. L. R. B. v. Wyman-Gordon Company, 394 U.S. 759. Accordingly, it hereby is directed that an election eligibility list, containing the names and addresses of all eligible voters, must be filed by the Employer with the Regional Director, Region 2, within 7 days of the date of this Decision and Direction of Election. In order to be timely filed, such list must be received in the Regional Office, Federal Building, 26 Federal Plaza, Room 3614, New York, New York 10007, on or before May 3, 1974. The Regional Director will make the list available to all parties to the election. No extension of time to file this list will be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.^{4/} Those eligible shall vote whether (or not) they desire to be represented for collective-bargaining purposes by District 65, Distributive Workers of America.^{5/}

/s/ Sidney Danielson
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10007

Dated April 26, 1974
at New York, New York

^{5/} Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this decision may be filed with the Board in Washington, D.C. This request must be received by the Board in Washington by May 9, 1974.

GENERAL COUNSEL'S EXHIBIT NO. 5

State of New York)
 ss
County of New York)

MARTIN ZELL, being duly sworn, deposes and says:

I reside at 11 Neal Drive, East Brunswick, New Jersey 08816. Tel 201 238-1824. I can also be reached at Zim Textile Corp., 6 E. 32 St., New York, New York, Tel 684-1550. I am a salesman and warehouse/office manager for the Employer since at least April 4, 1974. I have been with the Employer four years.

* * * * *

Vega was not at work that day. In the afternoon, I sat down with Colon to discuss the union situation. Prior to that, to my knowledge, neither I, Mockson or Zimbach talked with Vega or Colon about the union, and had no other knowledge of their union activity. I sat with Colon in the warehouse area. I asked him why he did what he did, if he knew what was involved, and for him to explain what the employees wanted. Colon replied they wanted certain benefits, also hospitalization. He also mentioned the union offering them a \$3,000 life insurance policy. Also he said about job security. I explained to him about our Blue Cross Policy. (I had told Colon back in December, 1973, after he commented about his ineligibility under welfare, that the next time Blue Cross opened up their enrollment, that I would put him and Vega in.) I showed him that I put the office clerical into the plan in early March, 1974. I said that I did not put him into the plan because of the start of this union thing. I do not recall now exactly what else was said by this point. I do not recall saying anything like if they joined the union, they would not be around anymore. I also told him that the company was considering pension plans for its employees, and showed him

copies of some plans (one plan, for example, was submitted to the company in February, 1973). I said according to federal law all employees must be included in the pension plan; I explained "resting" to him, etc. I brought Colon into the office when I showed him the Blue Cross and pension documents. In the office, also present was Linda Balmeo, bookkeeper. Colon, with Balmeo present, said they really wanted the benefits, and didn't want the union. I did not mention any benefits to Colon that he was not already receiving, or that the company was already considering. During this conversion, [sic] I do not recall specifically stating to Colon anything like he better drop his support of the union or he'd be fired. I told him to think about what we and the union were trying to do, overnight, talk to Vega, and let me know their decision the next day. I did not specifically say he had to decide upon staying with the union or not.

On March 29, 1974: Vega and Colon came in to work, sat in their room and talked privately. I told them when they came in to get together and discuss what I talked to Colon about yesterday. Later that morning, I went to their room and asked what they decided. Vega repeated that they really did not want a union, but were looking for some hospitalization, job security, and a larger raise than given a month ago. I asked if they were willing to accept what I spoke of, willing to work with me and trust me, for them to go down and tell the union they changed their minds and didn't want the union anymore. I also said that if I were assured that the union was dropping this filing, that I would immediately put them into the hospitalization plan. They said they would go during their lunch-break to the union to tell them to forget the shop. I did not specifically say they would be fired if they did not accept my offer. The talk ended. They left at noon, returned at 2 p. m. I asked what happened. They replied, "don't worry, it is taken care of."

* * * * *

On April 4, 1974: I received a copy of the petition from the NLRB. I spoke to Danielson of the NLRB, who advised me to talk to an attorney. I was very annoyed then. Colon came in. I showed him the petition, and said "do you realize this is going to cost thousands of dollars of legal fees, and that it was not filed till yesterday?" I said I got the feeling I was getting shitted upon. I asked Vega if he wants a union. My voice was raised. He slammed his palm on the desk, and said "I want a union." I said "you want a union, go let them find you a job." I went to Vega, and asked "do you want a union?" He said yes. I said "you too, let them go get you a job." I fired them both, and they left.

* * * * *

RESPONDENT'S EXHIBIT NO. 1A

NLRB 601
(7-57)UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

WITHDRAWAL REQUEST

In the matter of 21M Textile 2 RC 16475
 (Name of case) (Number of case)

This is to request withdrawal of the (petition) (~~charge~~) in the above case.

Withdrawal request approved

 (Date)

 Regional Director,
 National Labor Relations Board.

District 65
 (Name of Party Filing)
 By Ralph Cassman
 (Name of Representative)
General Organizer
 (Title)
 Date June 4, 1974

RESPONDENT
 Exhibit No. 1A

RESPONDENT'S EXHIBIT NO. 1B

ORDER PERMITTING WITHDRAWAL OF PETITION
AND VACATING DECISION AND DIRECTION OF ELECTION

On April 26, 1974, a Decision and Direction of Election issued in the above-entitled proceeding upon a Petition for Certification of Representative filed on April 3, 1974. On June 4, 1974, Petitioner filed a written request to withdraw said petition. On June 6, 1974, a Complaint and Notice of Hearing issued against the Employer in Case No. 2-CA-13304 upon an unfair labor practice charge filed by the Petitioner, alleging inter alia, the commission by the Employer of conduct constituting an unlawful refusal to recognize and bargain with the Petitioner in violation of Sections 8(a)(1) and (5) of the National Labor Relations Act as amended. Such conduct, if proven, precludes the existence of a question concerning representation. Accordingly, I shall permit a withdrawal of the instant representation proceeding, subject to its reinstatement by the Petitioner, if appropriate, upon final disposition of the aforesaid unfair labor practice case.

NOW THEREFORE IT IS ORDERED that the Decision and Direction of Election issued herein be, and it hereby is, vacated and Petitioner's request to withdraw the petition be, and it hereby is, granted.

Dated at New York, New York, this 7th day of June, 1974.

/s/ Sidney Danielson
Regional Director
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10007

RESPONDENT'S EXHIBIT NO. 2A

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Form Approved
Bureau Bulletin No. 44-1001-11

PETITION

DO NOT WRITE IN THIS SPACE

Case No. 1775
Date Filed June 24, 1974

EXERCISE YOUR RIGHTS under the National Labor Relations Act by filing this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.
If more space is required for any one item, attach additional sheets, numbering them accordingly.

1. The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 1 of the National Labor Relations Act:

2. Purpose of this Petition is to see that RM is not checked and a charge under Section 8(a)(1) of the Act has been filed involving the Employer named herein. The statement herein of the Definition of the type of petition shall not be deemed made.

3. Check one:

☐ REQUEST FOR CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining. Petitioner and Employer desire to be certified as representative of the employees.

☐ REQUEST FOR CERTIFICATION EMPLOYER DESIRES TO BE CERTIFIED AS REPRESENTATIVE OF EMPLOYEES OF PETITIONER.

☐ REQUEST FOR CERTIFICATION - A substantial number of employees desire that the certified or currently recognized bargaining representative is not a bargaining representative.

☐ REQUEST FOR A NEW BARGAINING UNIT - There is present a unit of more than one employer in a bargaining unit created by an agreement between the employer and a labor organization. It is desired that such agreement be rescinded.

☐ REQUEST FOR A NEW BARGAINING UNIT - A labor organization is currently recognized by employer, but petitioner seeks clarification of placement of unit of employees in Act.

☐ REQUEST FOR A NEW BARGAINING UNIT - In unit previously certified in Case No. _____.

☐ REQUEST FOR A NEW BARGAINING UNIT - Petitioner seeks amendment of certification issued in Case No. _____.

4. Name of Employer: Martin Bell

5. Name of Petitioner: _____

6. Address of Employer: _____

7. Address of Petitioner: _____

8. Type of Establishment (factory, mine, warehouse, etc.): Blankets & Bedspreads

9. Unit Involved (check petition describes PRESENT bargaining unit and attach description of proposed unit below):

Included: all working, receiving, stock, office clerical and maintenance employees

Excluded: people, watchmen and supervisors as defined in the Act.

10. Basis for Decision and Direction of Election in Case No. 8: _____

11. If you have checked box RM in 1 above, check and complete EITHER item 11a or 11b, whichever is applicable:

11a. Request for recognition as Bargaining Representative was made on _____ (Month, day, year) and Employer declined recognition on or about _____ (Month, day, year). (If no reply received, so state)

11b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

12. Recovered or Claimed Bargaining Agent (if there is none, so state): _____

13. Affiliation: _____

14. Address: _____

15. Date of Recognition or Certification: _____

16. Date of Expiration of Current Contract, if any: (Month, day, year) _____

17. If you have checked box RM in 1 above, show here the date of execution of agreement granting union shop: (Month, day, year) _____

18. Is there a strike or picketing at the Employer's establishment? YES NO

19. If so, approximately how many employees are participating? _____

20. The Employer has been picketed by or on behalf of _____ (Insert name) _____ A LABOR ORGANIZATION OF _____ (Insert address) _____ SINCE _____ (Month, day, year)

21. Organizations, or individuals other than petitioner, and other than those named in items 8 and 11a, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 9 above: (If none, so state)

NAME AFFILIATION ADDRESS DATE OF CLAIM (Required only if Petition is filed by Employer)

22. I declare that I am the petitioner and that the statements herein are true to the best of my knowledge and belief.

Signature of Petitioner: _____

Signature of Employer: _____

Address: _____

Telephone Number: _____

RESPONDENT
Exhibit No. 2A

RESPONDENT'S EXHIBIT NO. 2B

NATIONAL LABOR RELATIONS BOARD
Region 2
Federal Building, Room 3614, 26 Federal Plaza
New York, New York 10007

June 26, 1974

Zim Textile Corp.
6 East 32nd Street
New York, N. Y. 10016

Re: Zim Textile Corp.
Case No: 2-RM-1715

Gentlemen:

The petition in the above-captioned case, requesting an investigation and certain action under Section 9 of the National Labor Relations Act, has been carefully investigated and considered.

As a result of the investigation, it appears that further proceedings are not warranted.

A complaint has been issued by me in Case No. 2-CA-13304 alleging, inter alia, that you have failed and refused to bargain with District 65, Distributive Workers of America, in violation of Section 8(a)(5) of the National Labor Relations Act. In these circumstances no valid basis is present at this time for a finding that a question concerning representation exists, and I therefore am dismissing the petition in this matter. My dismissal of your petition is without prejudice to a request by you for its reinstatement upon the final disposition of the unfair labor practice case.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the National Labor Relations Board, Washington, D. C. 20570. A copy of such appeal must be served upon each of the other parties to the proceeding and upon me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal (8 copies) should be filed with the Board in Washington, D. C. 20570 by the close of business on July 9, 1974, except that the

Board may, upon good cause shown, grant special permission for a longer period within which to file. The request for extension of time should be submitted to the Board in Washington, and a copy of any such request for extension of time should be submitted to me and to the other parties to this proceeding.

Very truly yours,

/s/ Sidney Danielson
Regional Director

REGISTERED MAIL
R. R. R.

cc: National Labor Relations Board
Washington, D. C. 20570

Milton Horowitz, Esq.
15 Park Row
New York, N. Y. 10038

District 65, Distributive Workers of America
13 Astor Place
New York, N. Y. 10003
Att: Mr. Ralph Passman, Esq.

RESPONDENT'S EXHIBIT NO. 3

1

BEFORE THE NATIONAL LABOR RELATIONS BOARD
Second Region

In the Matter of:
ZIM TEXTILE COMPANY,
Employer
and
DISTRICT 65, DISTRIBUTIVE WORKERS OF
AMERICA
Petitioner

Case No.
2-RC-16475

26 Federal Plaza,
New York, New York
Wednesday, April 17, 1974

Pursuant to notice, the above-entitled matter came on for
hearing, at 10:15 a. m.

BEFORE:

JOEL SPIVAK, Hearing Officer.

APPEARANCES:

MILTON HOROWITZ, ESQ.

15 Park Row, New York, New York,
appearing on behalf of the Employer.

RALPH PASSMAN

13 Astor Place, New York, New York,
Representative, appearing on behalf
of the Petitioner.

2

CONTENTS

<u>Witnesses</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Martin Zell	9	40		
Israel Colon	56			
Nelson Vega, Jr.	69			
Martin Zell	73			

EXHIBITS

<u>BOARD</u>	<u>FOR IDENTIFICATION</u>	<u>IN EVIDENCE</u>
1		4

3

PROCEEDINGS

HEARING OFFICER SPIVAK: This hearing will be in order. This is a formal hearing in the matter of Zim Textile Company, Case No. 2-RC-16475, before the National Labor Relations Board.

The hearing officer appearing for the National Labor Relations Board is Joel Spivak.

All parties have been informed of the procedures of formal hearings before the Board by service of a statement of standard procedures with the notice of hearing.

I have additional copies of this statement if any party wishes more.

Will the representatives of the parties please state their appearances for the record.

For the petitioner?

MR. PASSMAN: Ralph Passman for the petitioner, general organizer.

MR. HOROWITZ: For the employer, Milton Horowitz, 15 Park Row, New York, New York, attorney for the employer.

HEARING OFFICER: Are there any other appearances?

Let the record show no response.

4 Are there any other persons, parties or labor organizations in the hearing room at this time who claim an interest in this proceeding?

Let the record show no response.

For the petitioner, Mr. Passman, who can be served with the official Board papers, please?

MR. PASSMAN: Gene Eisner, attorney for District 65, 13 Astor Place.

HEARING OFFICER: Mr. Horowitz?

MR. HOROWITZ: Milton Horowitz, 15 Park Row, 10036.

HEARING OFFICER: I now propose to receive the formal papers. They have been marked for identification as Board's Exhibit 1. This exhibit has been shown to the parties.

Are there any objections?

MR. HOROWITZ: No objection.

MR. PASSMAN: No.

HEARING OFFICER: Not hearing any objections, the papers are received.

(Board's Exhibit 1 for identification was received into evidence.)

HEARING OFFICER: Mr. Horowitz, do you have anything to say at this time?

5 MR. HOROWITZ: Yes. At this time, Mr. Hearing Officer, I move to amend the title of this proceeding insofar as it relates to the employer's correct name. Employer's correct name is Zim Textile Corporation and not Zim Textile Company as it now appears and I now so move for the correction?

HEARING OFFICER: Any objection?

MR. PASSMAN: No objection.

HEARING OFFICER: Hearing no objection, I grant the motion.

Prior to the hearing the company supplied the following information. The employer, a New York corporation with its sole location at 6 East 32nd Street, New York, New York 10016, is engaged in the non-retail sale of blankets, bedspreads, towels and linens. During the past fiscal year, the employer received gross revenues in excess of \$50,000. During that same period the employer purchased goods including blankets, towels and linens valued in excess of \$50,000 directly from firms located outside the State of New York and received in excess of \$50,000 directly to firms located outside the State of New York.

Mr. Horowitz, is that a fair statement of the business operations of the company?

MR. HOROWITZ: It is.

HEARING OFFICER: Do you stipulate that the company is engaged in interstate commerce within the meaning of the Act?

6 MR. HOROWITZ: I so stipulated.

HEARING OFFICER: Mr. Passman, do you so stipulate?

MR. PASSMAN: Yes, sir.

HEARING OFFICER: Will the company furnish a payroll and cooperate with the Board in the holding of any election the Board might direct?

MR. HOROWITZ: It will.

HEARING OFFICER: Mr. Passman, is the correct name of the petitioner that which appears on the petition filed in this case, that is, District 65, Distributive Workers of America?

MR. PASSMAN: Yes.

HEARING OFFICER: Are there any other affiliations which haven't been noted?

MR. PASSMAN: No.

HEARING OFFICER: Can it be stipulated that the petitioner herein, District 65, Distributive Workers of America, is a labor organization within the meaning of the National Labor Relations Act, as amended?

Do you so stipulate on behalf of the company, Mr. Horowitz?

MR. HOROWITZ: So stipulated.

HEARING OFFICER: Mr. Passman, do you so stipulate on behalf of the union?

7 MR. PASSMAN: So stipulated.

HEARING OFFICER: Is it the position of the petitioner that you represent a majority of the employees in an appropriate unit and you are making this claim now?

MR. PASSMAN: Yes.

HEARING OFFICER: Does the employer at this time decline to recognize the petitioner as the exclusive collective bargaining agent for the employees in the unit petitioned for until such time as they are certified as such in an appropriate unit determined by the Board?

MR. HOROWITZ: That is the company's position.

HEARING OFFICER: At this time I propose to get a statement as to the issues which we will be litigating here today.

Mr. Passman?

MR. PASSMAN: The union is claiming that the unit involves three employees, two in shipping, receiving, stock production and maintenance and one in the office.

HEARING OFFICER: Mr. Horowitz?

MR. HOROWITZ: The issue as the company sees it and as the company proposes to demonstrate is that the appropriate unit here excluding supervisory personnel and others who would not

8 appropriately be included here in the unit sought to be bargained for consists of two individuals, one office clerical employee and one

shipping and general production maintenance employee and that a former employee who was laid off last week was not temporarily laid off as that term is understood.

The company's position was that it was an indefinite layoff with very little likely prospect of recall in the future because of circumstances which will be demonstrated.

* * * * *

77 HEARING OFFICER: * * * At this time if there are any positions for the petitioner, Mr. Passman, would you like to make a closing statement?

MR. PASSMAN: Yes.

78 I would like to state that the approach of the union on behalf of the unit was made after three employees had joined the union.

We feel that the layoff which has occurred to now change the picture in which the unit was established, we believe is unfair and we think that the employee who was laid off basically was not laid off in good faith and that this question of only employing one employee is not true, that the company has always operated with two in the shipping department and to say now that they foresee a bad seasons, to have that be the criteria to say that this employee will no longer be recalled is, as far as we are concerned, not to be a fact and not to be a reason for stating that the company no longer needs two people in the shipping and received department.

HEARING OFFICER: For the employer?

MR. HOROWITZ: I would say that Mr. Passman has misstated the issue which was not motivation of the layoff but the question of whether the business had a temporary layoff with a definite expectation of return in a comparatively short period following some pattern or whether this is a layoff which, in its nature is indefinite and not a temporary layoff as that is understood in a representation proceeding.

* * * * *

1 [EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS]
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SECOND REGION

* * * * *

26 Federal Plaza
New York, New York
Wednesday, July 10, 1974

* * * * *

3 PROCEEDINGS

JUDGE GOLDBERG: The court will come to order.

This is a trial before the National Labor Relations Board in the matter of Zim Textile Corporation and District 65, Distributive Workers of America, Case Number 2-CA-13304.

The Administrative Law Judge presiding is Sidney D. Goldberg.

You have been informed concerning the procedure to be followed in trials before the board by the statement of standard procedures which you received with the complaint and notice of hearing.

In addition, I call your attention to section 10(b) of the National Labor Relations Act which provides that this case shall be conducted insofar as practicable in accordance with the rules of evidence applicable in the United States District Court under the rules of procedure in those courts.

All statements in this courtroom during the trial will be recorded by the official reporter unless the trial judge directs that the discussion be off the record.

I'll now take the appearances of counsel and other representatives for the parties.

On my left, who's this?

4 MR. HOROWITZ: I am Milton Horowitz. I am counsel for the respondent employer.

My address is 15 Park Row, New York, New York, 10038.

JUDGE GOLDBERG: Mr. Trunkes?

MR. TRUNKES: Thomas T. Trunkes, counsel for the general counsel.

JUDGE GOLDBERG: Any appearances for the union?

MR. PASSMAN: Ralph Passman, P-A-S-S-M-A-N, of District 65, 13 Astor Place, New York City.

* * * * *

6 JUDGE GOLDBERG: All right. Can this case be settled, Mr. Horowitz?

MR. HOROWITZ: No. I think that the presence of the demand for a bargaining order precludes any notion of settlement.

* * * * *

7 MR. TRUNKES: After the union, District 65, signed up a majority of respondent employees in an appropriate unit, and I might add Your Honor that there is a question of the unit, the union represented the two warehousemen of the employer and during the course of an RC hearing which was held in this matter previously, after a petition was filed, the Regional Director found an appropriate unit including the two warehousemen plus one office clerical employee, to which both parties during the course of the R case hearing agreed to be the appropriate unit.

JUDGE GOLDBERG: Did the Regional Director issue an order?

MR. TRUNKES: Yes, he did.

JUDGE GOLDBERG: Did anyone appeal from it?

MR. TRUNKES: No sir, I don't believe.

MR. HOROWITZ: No. As a matter of fact, for purposes of the representation proceeding, at the time of the hearing, when one of the two warehouse employees were laid off and the issue was whether that

lay-off was temporary, in expectation of fairly prompt return or indefinite, I consented to the inclusion of the office clerical per the demand of the petition basically so that there would be a viable unit to be voted on.

Let me put it this way.

If there had been two warehouse employees and an office clerical, I would have insisted on a globing of the office clerical --

8 JUDGE GOLDBERG: How, a one person unit?

MR. HOROWITZ: No. Since the one person at that time, office clerical, was of a group which would be entitled to be separately polled on whether they would accede to being included within such a unit, that's not in my --

JUDGE GOLDBERG: Isn't that all water over the dam, Mr. Horowitz?

You consented to the unit. The Regional Director found the unit. There's been no appeal. Has the time to appeal expired, Mr. Trunkes?

MR. TRUNKES: Yes, a long time ago.

MR. HOROWITZ: As a matter of fact, what happened was that after the issuance of the order directing an election, -- and by the way, participation by the union in this representation proceeding after all of these things are supposed to have been occurred and which they were well aware -- only after that were charges filed, and again that point of consent was basically to allow an election to proceed forward.

I was very well aware that if only one warehouseman were in a unit, that would not be a viable unit. That was the reason for -- I grant you, the appropriateness of the unit is in no way in question.***

* * * * *

10 MR. TRUNKES: Right.

Anyway, regardless of what the appropriate unit includes, Your Honor, District 65 did obtain two signed cards from the two

warehousemen and made a demand for recognition on or about March 28th, and thereafter respondent by its supervisor Martin Zell engaged in a series of unfair labor practices in an attempt to undermine the unit, to wit, on March 29th respondent offered and promised medical benefits if the employees would abandon the union.

On April 4th respondent unlawfully interrogated these employees, and in fact after ascertaining that they wanted the union, discharged Israel Colon and Nelson Vega, the two warehousemen.

Although the next day he immediately reinstated these employees, on April 11th, the following week, he laid off Mr. Vega again on the basis allegedly that there was no work for him.

Also the same day, April 11th, he withdrew benefits previously granted to the employees which in essence was the payment for a Good Friday holiday on April 12th.

Now, after the -- since the demand for recognition was made by District 65, respondent has refused and continues to refuse to recognize and bargain with the union until the present time; and to fill you in, Your Honor, following the immediate request for recognition on March 28th, when the District 65 saw that it was not forthcoming, it did file a petition for an election on April 3rd, and a hearing was held, which we have just discussed, and in which the Regional Director did rule that one of the employees had been permanently laid off with no immediate expectancy of hiring, and following the Director's decision, the union did file the instant charges, for which we are here, and after an investigation, of course, the Regional Director concluded that although the employee may have been let go by the respondent permanently and was not eligible to vote, the Director also found out or believes that the employee was let go because of the animus of the employer against the union, his efforts to dissipate the union majority, and --

JUDGE GOLDBERG: How do you reconcile those two things? If he was discharged in violation of law he is still an employee and entitled to vote.

MR. TRUNKES: I think Mr. Horowitz mentioned, at the time the petition was filed we didn't have an unfair labor practice charge. It was after, I believe, the director's decision that the union did file the charge.

12 JUDGE GOLDBERG: Oh, had the other employee been laid off at the time of the hearing?

MR. TRUNKES: Yes, he had been laid off prior to the hearing.

* * * * *

15 MR. HOROWITZ: *** that the only unfair labor practice, if such it can be characterized, after the institution of representation proceedings, was a discharge made in anger and very, very promptly rectified.

So that if we talk to the practicality of things, the practically immediate affect was not the undermining of a union, but the ability of an employer to stand self-corrected and to self-correct his own dereliction.

We don't intend to alter facts that happen. They happen and -- but I am saying that since that petition was filed, and the petition in itself voiced the demand for a unit different from whatever had been spoken about before then -- that you had a legitimate question concern-

16 ing representation and that was not dissipated by the very quickly corrected wrongful act of April the 4th.

Good Friday, I think we can demonstrate, has no substance to it, and the lay-off purely economically motivated, we are prepared to demonstrate that.

* * * * *

23 MR. HOROWITZ: Yes, one other thing that I'm thinking of.
There is a subsequent history so that in affect there are two
representation proceedings.

After the issuance of the complaint herein, District 65 by a
request for withdrawal of its petition and the Regional Director re-
voked his order directing the election.

* * * * *

24 ISRAEL COLON

having first been duly sworn, testified as follows:

* * * * *

25 DIRECT EXAMINATION

* * * * *

26 Q. (By Mr. Trunkes) Did there come a time when you or
Mr. Vega or both of you spoke to Mr. Zell or someone else in the
place about working conditions? A. Yes.

27 Q. Would you describe to us what was said or who you spoke
to? A. I spoke to Marty Zell, you know, and I asked him -- actually
I told him about, you know, my situation --

MR. HOROWITZ: Sir, I think this should be fixed in time so we
can have some idea.

JUDGE GOLDBERG: It's a good idea. It is not a legal objection,
but I think counsel ought to be careful.

Can you give us the date of that conversation?

THE WITNESS: I can't tell you the date.

JUDGE GOLDBERG: How close can you get?

THE WITNESS: Maybe November, December. There was two
occasions that we did have talks like that.

JUDGE GOLDBERG: Both in November, December of 1973?

THE WITNESS: Yes, '73, yes.

JUDGE GOLDBERG: In other words, it was after Vega came on?

THE WITNESS: Yes.

JUDGE GOLDBERG: All right. Go ahead, Mr. Trunkes.

Q. Tell us what -- who spoke to Mr. Zell or was it Mr. Zell you spoke to? A. Yes, I spoke to Mr. Zell.

28 Q. Were you there by yourself or was Mr. Vega with you at any of this time? A. We were working and at the same time we were talking, and I explained my situation, that I was on welfare and I had Medicaid and I was losing the Medicaid and I talked to him and I said I would like to get medical benefits and he said he can't do it, he has to speak to the boss.

Q. Who is the boss? A. Mr. Simbach.

Q. Did he tell you what Mr. Simbach might say to these requests? A. He said he might not go for it, you know.

Q. Was anything mentioned by anybody about a union during these conversations? A. Then I said, well, then the only thing that's left for me to do is to go to the union, and then he replied to that, well, you can do what you want, but the old man won't go for it.

He won't stand for it.

Q. By old man -- A. Mr. Simbach.

Q. Did he indicate what Mr. Simbach would do? A. No, he said if we were to do something like that he would throw us out in the street, fire us.

JUDGE GOLDBERG: I don't think I heard it all. He would throw you what?

29 THE WITNESS: Put out in the street. You know, like in other words, fire us.

JUDGE GOLDBERG: What did he say did he say put you out on the street or did he say fire you?

THE WITNESS: He said, well, if you were to do that and he will find out, you'll land right out in the street.

* * * * *

Q. Did there come a time, Mr. Colon, where you contacted a representative of District 65? A. Yes.

Q. When was that? A. I called up somewhere in January. Did he say I called up Eddie Pagan?

Q. A few days prior to calling Mr. Pagan, do you recall having a conversation with Mr. Zell? A. That was the second time I had the conversation with him.

Q. What did you tell Mr. Zell the second time? A. That I had already gone to the union and done -- and talked to somebody that they were going to -- just to see what would happen.

30 He says if you did that -- I guess he didn't really believe --

JUDGE GOLDBERG: Will you please keep to what was said.

THE WITNESS: Okay.

JUDGE GOLDBERG: Not what you think.

THE WITNESS: All right.

JUDGE GOLDBERG: What did he say?

THE WITNESS: When he told me that, I don't care what you do, but if the old man finds out, he will fire you.

JUDGE GOLDBERG: This was the second conversation?

THE WITNESS: The second time.

Q. And this occurred before you went to the union? A. This is before I went to the union.

Q. But you had told him you did go to the union? A. Yes.

Q. And that was not so? A. That was not so.

Q. Following that conversation, several days later, you did contact Eddie Pagan, is that right? A. Yes.

Q. Did there come a time when you and Mr. Vega met with Mr. Pagan? A. Yes.

31 Q. Approximately when was that? A. That was February 7th.

Q. Where did you meet him? A. We met in a restaurant on Madison Avenue.

Q. How far is that from your place of business? A. About a block away.

Q. Was this before work, during lunchtime or after work? A. It was at lunchtime.

* * * * *

32 Q. During the course of this conversation with Mr. Pagan, and as a result of the conversation, did you sign an application card for the union? A. Yes.

Q. Did Mr. Vega? A. Yes.

Q. Did you see him do so? A. Yes.

MR. TRUNKES: I would like to mark Exhibits 2A, Mr. Colon, and Exhibit 2B, Mr. Vega's cards here.

JUDGE GOLDBERG: All right, consider them marked. Proceed.

(General Counsel's Exhibits 2A and 2B marked for identification.)

Q. I show you what has been marked as General Counsel's 2A. Would you identify this card for us, please? A. Yes.

JUDGE GOLDBERG: What is it?

THE WITNESS: This is the card that I signed for the membership of the union.

JUDGE GOLDBERG: Is your signature on it?

THE WITNESS: Yes.

JUDGE GOLDBERG: Are you offering it, Mr. Trunkes?

MR. TRUNKES: Yes.

33 JUDGE GOLDBERG: Show it to Mr. Horowitz.
MR. TRUNKES: I have. He is looking at a photocopy.
JUDGE GOLDBERG: I see. All right.
Q. And --
JUDGE GOLDBERG: Wait a minute.
Let's dispose of this.
MR. HOROWITZ: I have no objection.
JUDGE GOLDBERG: It is received.
2A is received.

(General Counsel's Exhibit 2A is
received in evidence.)

Q. Did you say Mr. Vega signed this card, I show you what
is marked as Exhibit 2B. Would you identify this document?

A. Yes.

Q. What is it? A. This is another application for the mem-
bership of the union.

Q. Whose signature is on it? A. Nelson's.

Q. Did you see him sign it? A. Yes.

MR. TRUNKES: I offer this into evidence.

JUDGE GOLDBERG: Mr. Horowitz.

MR. HOROWITZ: No objection, except that with respect to
certain numbers that are stamped and certain writings other than that
that appear to have been put on the card by others.

34 JUDGE GOLDBERG: Check it with Mr. Trunkes and exclude --

MR. TRUNKES: We will agree that all the writing in the box
that says "do not write in the space" be excluded and also, I suppose,
after District 65, 1-2.

Is that okay, Mr. Horowitz?

MR. HOROWITZ: Sure.

MR. TRUNKES: And that would go for the both cards which has
approximately the same additions?

JUDGE GOLDBERG: Any objections, Mr. Horowitz, to 2B?

MR. HOROWITZ: None, Your Honor.

JUDGE GOLDBERG: It is received.

(General Counsel's Exhibit 2B is received in evidence.)

* * * * *

36 Q. (By Mr. Trunkes) You continued working through February and March at Zim, is that correct? A. Yes.

Q. And do you recall at any time, at some future time, Mr. Pagan and Mr. Passman coming into the shop? A. Yes.

Q. And could you tell us approximately when that occurred? A. Oh, somewhere in March, middle of March. I don't remember the date too well.

Q. And when they came in, where did they go? A. They came into the office.

Q. Whose office? A. Mr. Zell's office.

Q. Did you go in with them? A. No.

Q. Where were you? A. I was outside packing an order, just outside the door.

37 Q. Were you able to hear the conversation occurring in the shop? A. Yes.

Q. Would you tell us what you heard? A. Well, Mr. Passman and Mr. Pagan came in and they introduced themselves and they told us that they represented us and that they wanted to talk about bargaining for the contract.

Q. Did you hear what Mr. Zell said? A. He said that he couldn't do nothing about it because he is not the boss, he would have to speak to Mr. Zimbach first.

Q. Then what happened? A. Then they left. They left their card for him to get in touch with them.

* * * * *

38 Q. Now, after this incident in March when Mr. Passman and Mr. Pagan visited the shop, do you recall having a conversation with Mr. Zell about -- pertaining to this union business? A. Yes.

* * * * *

Q. How long after? A. A couple of days. I couldn't tell you exactly.

JUDGE GOLDBERG: Do your best. That's all we expect.

THE WITNESS: It's so long ago.

JUDGE GOLDBERG: A couple of days.

Q. What did Mr. Zell tell you?

39 Where was the conversation first? A. In the back where we worked.

Q. You were working? A. Not this particular day. I think I was on my brunch break.

Q. During lunch hour? A. Yes.

Q. Was Mr. Vega with you by the way? A. No he was not there.

Q. What did Mr. Zell say? A. Mr. Zell came in and he came in and asked me -- talked to me, let me know what was happening.

I said I told you what I was going to do and I explained to you previously.

He says, yes, but this union thing is no good, it is going to cause -- I said look, Marty, I explained what I wanted.

You said there was no other way for me to do it so I did it this way.

He started telling me, well, look, I got medical benefits and some pension plans I'm trying to get together and he showed me a whole

bunch of papers stating the plans that he had, and I said, you know, you have been trying to do this and you haven't done it.

I guess the only way I can do something is with the union and I did it this way.

40 He says, well, look, what is it that you want, and I told him that I want medical benefits and some better conditions.

He says if I promise that I can get you something like this, would you forget about the union.

I said if you can get me these things, I don't need the union.

Q. What did he say to that? A. After we talked for a while, he said, well, think about it, and then he started telling me, if the old man were to find out, he is going to fire you, I don't want you to lose your job, I like you. If the old man were to find out, he is going to fire you.

Q. At the time you had the conversation, were you aware whether or not the union had filed a petition for an election? A. At that time, no.

* * * * *

41 JUDGE GOLDBERG: I believe it is alleged in the complaint and admitted, that on April 3rd, District 65 filed a petition in 2-RC-16475.

It was not denied. It is deemed admitted.

Q. Do you recall how long after the petition was filed that you had a conversation with Mr. Zell? A. Yes. I think it was the next day.

Q. Fine.

Where was this conversation? A. In the office. When I came in in the morning.

Q. Would you tell us what the conversation was? A. Well, he asked -- you know, he came in and then he asked me if I had talked with Eddie Pagan from the union and told him that I didn't want the union.

I said, look, Marty, I can't do nothing like that about forgetting the union because they filed a petition for an election. Now we have to wait for the vote.

He says, yes, now it is going to cost me money and I got to get a lawyer and this and that.

I said, Marty, it is not my fault, I told you what I wanted. It is not my fault.

He started yelling at me.

I said look, Marty, I want the union.

He said what did you say? I said I wanted the union, he said if you want the union, you are fired.

42 Q. Did you say anything to that? A. If that's the way it is got to be, so be it.

Q. What happened immediately after that?

Where was Mr. Vega? A. Mr. Vega was in the bathroom and then Marty yelled out to Nelson, Nelson, do you want the union. And Nelson said yes. And he said you are fired too.

And then we got our clothes together and went out.

On the way out I said, Marty, remember, you fired us, we didn't quit.

Then we went to the union.

Q. Who did you see at the union? A. Ralph Passman.

Q. As a result of the meeting with Mr. Passman, did you go back to the shop that day? A. Yes. Ralph told us --

Q. What time of day was this when he fired you? A. In the morning, just right after I came in. About 9:15, 9:10.

Q. Did you meet with Mr. Passman outside the shop that day? A. Yes.

Q. About what time was that? A. He told us to meet him at 12:30 in the afternoon.

43 Q. Did you? A. I met him there.

Q. Did you meet anybody else? A. Eddie Pagan was also there.

Q. Was Mr. Vega with you also? A. And Vega.

Q. He had gone to the union with you also? A. Yes.

Q. What did the four of you do? A. We went upstairs.

Q. And? A. And then Ralph Passman talked to Mr. Zell and told him he wanted us reinstated, and Mr. Zell said there was nothing he could do, and then Ralph told him --

Q. Repeat that. A. He said there was nothing he could do, it was out of his hands.

Q. And then? A. Then Ralph told him, you know, you committed an unfair labor practice and you are not supposed to do this.

He says, look, there is nothing I can do, I guess I have to get in touch with my lawyer.

At that time, we left.

Q. This was April 4th, Thursday, wasn't it? A. Yes.

44 Q. When is your pay day? A. Friday.

Q. What were you doing about getting paid for that week?

A. He told us to come back the next day.

Q. Who told you? A. Mr. Zell told us to come back the next day to get our checks.

Q. Did you come back the next day? A. Yes.

Q. Before you went into the building, did you meet anybody outside? A. I met Eddie Pagan.

Q. What did Mr. Pagan say to you? A. When we got to the place, we seen Eddie and then we told Eddie and then Eddie said he wants you to go back to work.

Q. Who is "he"? A. Mr. Zell wants you to go back to work.

He called the union and he wants you back to work. So we said all right. So we went upstairs, and we asked Mr. Zell what's happening.

He said for the time being if you guys want to work here you can work.

We said we want to work and we started working.

45 Q. Did you get your pay check that day? A. Yes.

Q. Was any time deducted for the time you weren't working that week? A. No, we got the whole check.

* * * * *

50 CROSS EXAMINATION

Q. (By Mr. Horowitz) Mr. Colon, toward the end of 1973, could you tell us who the personnel of Zim Textile Corporation were?

* * * * *

52 Q. And was there any bookkeeper or office girl there?

53 A. Yes.

Q. Can you tell us her name? A. Her name is Linda -- I don't know her last name. She is --

JUDGE GOLDBERG: That's all right. I think you probably know it, Mr. Horowitz. The witness has testified, a female office clerk named Linda.

Q. Now you testified that sometime, perhaps November or December of 1973, that you were no longer eligible for welfare or Medicaid, is that correct? A. Let me explain.

I wasn't no longer eligible for Medicaid, I myself, since I got the job. I'm speaking of my wife and kids, they lost theirs when she got into a training program. That's what I was speaking of.

Q. So did you suggest to Mr. Zell -- A. Yes.

Q. -- that you would like to have, let's say, Blue Cross, Blue Shield coverage? A. Yes.

Q. Can you tell us what Mr. Zell said in respect to that? A. He said that he could do nothing about that.

54 Q. You are sure that he made no promise of getting you onto Blue Shield, Blue Cross? A. He made promises before that, twice.

JUDGE GOLDBERG: Stick to this particular time. What did he say?

THE WITNESS: When I asked him about that -- in November, right, that I had started talking to him, at that time, now that I remember well, he told me that the next time that the Medicaid would come in, he would seek to get me on the medical benefits.

Q. Were you drawing any unemployment benefits in the later part of 1973? A. I never have drawn unemployment benefits.

Q. What social security number did you give for yourself?

MR. TRUNKES: Your Honor --

JUDGE GOLDBERG: What's the purpose of that?

MR. HOROWITZ: One, it bears on the credibility of this witness.

JUDGE GOLDBERG: How?

MR. HOROWITZ: Two, I think it shows how manipulative he can be.

JUDGE GOLDBERG: Are you going to make some kind of issue about social security numbers here?

MR. HOROWITZ: Well, there is an issue of fraud.

JUDGE GOLDBERG: Where?

55 MR. HOROWITZ: In giving a false social security number to cover somebody else and I'm suggesting that this has a bearing on Medicaid.

JUDGE GOLDBERG: You have got a lot of unpinned down statements. Are you going to raise an issue that this witness committed any kind of fraud or gave an improper social security number to your client?

MR. HOROWITZ: Yes, I will.

And I say again, the purpose of it is to show that his unsupported testimony is not worthy of credence, that he can tailor it to accommodate --

JUDGE GOLDBERG: Ask your question. Go ahead.

Q. Isn't it a fact that the social security number that you gave when you got the job and that you used for the balance of '73 was actually the social security number of your father? A. Yes. But that was a mistake.

JUDGE GOLDBERG: Wait a minute. Wait just -- okay, I think you just are justified in completing your answer. That's the witness's answer.

Q. As of January, 1974, did you give Mr. Zell you correct social security number? A. Yes, because my father brought it clear to me that I had his. By mistake, when I got the statement, when I got the tax statement, he showed me the number, he says you
56 have the number on here, I think you used the wrong security card. He's not the same name I do, and I don't remember my social security number off the top of my head.

When he made this clear to me, I told Mr. Zell about it and I got it changed.

JUDGE GOLDBERG: When did you tell him?

THE WITNESS: In January.

* * * * *

Q. Now, you have testified that Mr. Zell spoke to you alone at first and then thereafter to you and Mr. Vega several days after the
57 visit that you described in March, is that correct? A. Yes.

Q. I want you to think carefully. Does it confirm with your recollection that the day you were spoken to alone was the afternoon of the very day that the union had visited the plant, is that possible, or is that what happened? A. The very day that the union came in he spoke to me?

Q. In the afternoon. A. No, not to my recollection. Because if he would have spoken to me, he would have spoken to Mr. Vega. Mr. Vega was with me the very day they came in. And the day he spoke to me, Mr. Vega wasn't there.

Q. Do you recall being asked by Mr. Zell to think it over and to discuss it with Mr. Vega when Mr. Vega came in? A. Yes, he told me that. And he also told me to talk it over with my wife and see what he would say about it.

JUDGE GOLDBERG: I can't hear you, Mr. Witness.

THE WITNESS: He told me to talk it over with my wife so she could, you know, give me more or less an idea of how to act.

Q. Now, you also testified that there came a time following these conversations and conferences that you told Mr. Zell you weren't
58 interested so much in the union as you were in conditions, is that correct? A. Yes.

Q. Did you and Mr. Vega go down to the union -- did you tell Mr. Zell that you were going to the union with Mr. Vega to tell them that you wanted their interest withdrawn? A. No.

Q. Did you tell Mr. Zell anything about going down to the union with Mr. Vega during lunch hour? A. I told Mr. Zell on a Friday that I was going to speak to Mr. Eddie Pagan. Yes, I told him that. But I did not tell him that I was going to tell the union to forget about it. No.

* * * * *

Q. So did you start out on a journey with Mr. Vega on a Friday, as you recall -- A. Yes.

Q. -- to see Mr. Pagan? A. Yes.

Q. And you told Mr. Zell that you were going on that journey
59 to see Mr. -- A. Pagan.

Q. -- Pagan. And what was this, the Friday before the week of your discharge? A. I think so. I don't remember too good.

Q. Do you remember whether it was a Friday? A. Yes, it was a Friday.

Q. Was it after the union had visited? A. Yes, he knew about it.

JUDGE GOLDBERG: After the union had visited where?

THE WITNESS: The office.

JUDGE GOLDBERG: Very well.

Q. Now, the day you went down was the day you had spoken to Vega about it, correct? A. Excuse me. I don't understand.

Q. On this Friday you went down to see the union.

Now, you went down with Mr. Vega? A. Yes.

* * * * *

61

NELSON VEGA

having first been duly sworn, testified as follows:

JUDGE GOLDBERG: What is your name, please.

THE WITNESS: Nelson Vega.

DIRECT EXAMINATION

Q. (By Mr. Trunkes) Where do you live, Mr. Vega?

A. 1183 Gerard Avenue, Bronx, New York.

Q. What's your occupation? A. Stock clerk.

Q. Were you ever employed by the respondent, Zim Textile Corporation? A. Yes, I was.

Q. When did you start working there? A. I don't know the exact date, but it was about October 22, 1973.

Q. Who hired you? A. Marty Zeli.

Q. What were you hired to do? A. To become a stock clerk for his company.

62 Q. Until what date did you work for Zim Textile? A. April 11, 1974.

Q. Do you recall after you started working for Zim any other employees working in the back as stock clerks? A. Yes, Israel Colon.

Q. Is he the only one? A. Yes.

Q. During the months of December, November, December, 1973 and January 1974, had you and Mr. Colon ever spoken to Mr. Zell about attempting to get better working conditions in the shop? A. Yes, we did.

Q. And do you recall any specific times that you were present and in discussions with Mr. Zell? A. I don't remember dates, exact dates, but I know quite a few times I remember Marty Zell had promised us and it never came through, it fell through.

Q. At the time you started working, there was no union, is that correct? A. Correct.

Q. Do you recall what kind of benefits you were getting from Zim at that time besides your wages? A. None, none at all.

Q. Did you get any paid sick days? A. No.

63 No. The only benefit that I really think we had was certain holidays that we got paid.

Q. Did you get any health benefits? A. None at all.

Q. Do you recall being present with Mr. Colon or by yourself and mentioning this to Mr. Zell? A. Yes.

Q. Could you tell us what Mr. Zell said when you brought this to his attention? A. First we told him that we would like some benefits to help us. Then he would say -- he would promise us, then we would see no action done.

Then we told him that we wanted the union, that we were going to bring the union in. And he threatened us.

Q. What did he say, actually? A. He actually said that the old man, that was Mr. Morris Zim. He said that if we had any union here he would fire me and Israel Colon, if we would bring any union into this shop.

Q. You mentioned a Morris Zim? A. Yes.

Q. Is that Mr. Zimbach that the previous witness had referred to? A. Yes.

64 Q. And he is the owner of the business? A. Yes, he is.

Q. Now, during one of your conversations with Mr. Zell, did he tell you about a story of a friend of his who had a business and had some union situation? A. Yes.

We were in the back working one day, me and Israel Colon, and he had told him -- him and Israel had a conversation and I was like two feet away from all of them, and he had told us a story that his friend had a textile company, too, in Manhattan, and the employees were going to bring in a union, so his friend didn't want the union, so he closed up the shop and he went down south and he has better work for the same wages than he would have with the union.

Q. Who said this now? A. Marty Zell.

Q. He said that to you and Mr. Colon? A. Yes, he had told us the story.

Q. In other words, throughout this two or three month period, you and Mr. Colon were unsuccessful in getting better working conditions at the place? A. Yes, we were.

65 Q. As a result of that, what did you or what did you or Mr. Colon do? A. Mr. Israel Colon said that he knows a union delegate, and I told him to go speak to him about our situation at the shop.

Q. Did there come a time when you met a union delegate? A. Yes, we did.

Q. Who was that? A. Mr. Eddie Pagan.

Q. Where did you meet him? A. We met in twelve o'clock at our lunch hour in a cafeteria downstairs.

Q. Do you recall what date that might be? A. February 7th. We signed cards that date, too.

Q. As a result of meeting with Mr. Pagan, you signed a union authorization card that day? A. Yes, we did.

Q. I show you what has been marked as General Counsel Exhibit 2B. Could you identify the document? A. Yes, this is the union card that I signed and my signature is right on the bottom.

Q. Did you see Mr. Colon sign the card that day? A. Yes, I did.

Q. I show you what's marked as General Counsel 2A.
A. Yes.

Q. Do you recognize that card? A. It's the same card with his signature on the bottom.

* * * * *

66 Q. Do you recall going to work or being at work on Thursday, April 4th, the week before you last worked for the company?

A. Yes, I do.

Q. What time did you get to work? A. Nine o'clock.

Q. Now, do you recall having a conversation with Mr. Zell at that morning? A. On April 4th?

Q. Yes. A. Yes, I did.

67 Q. Will you tell us the conversation had with you? A. Yes. He had some complaints that he had to get a lawyer because of me and Israel Colon, we were bringing in the union and that he had to lay out some money.

Q. Did you answer anything to that? A. I didn't say nothing. I just walked away.

Q. After you walked away, where did you go? A. I went to the locker room to change my clothes.

Q. While you were changing your clothes, did you hear any loud conversation? A. Yes, I heard Mr. Israel Colon and Mr. Marty Zell arguing, like.

Q. Where were they? A. In the office.

Q. How far is the office from where you work? A. About from here to where the door is.

* * * * *

JUDGE GOLDBERG: Twenty-five feet, stipulated.

68 Q. What did you hear Mr. Zell and Mr. Colon say, if anything?

A. They were having an argument about bringing in the union.

Q. Is this a closed office? A. No, it is open.

Q. It is open? There is no doorway between the office and where you work? A. There is a doorway. It always stays open.

Q. Is there a glass enclosure on it or is it a solid --

A. Solid door.

JUDGE GOLDBERG: Does a wall go all the way up to the ceiling, the wall between the floor and the office, is that all the way up to the ceiling?

THE WITNESS: Yes, all the way up.

JUDGE GOLDBERG: What is it made of?

THE WITNESS: I would say cement.

JUDGE GOLDBERG: All right. It is a solid wall.

THE WITNESS: Solid wall, right.

JUDGE GOLDBERG: And there is a door?

THE WITNESS: Right.

Q. What did you hear? A. I heard Mr. Marty Zell tell Israel Colon, if he wanted the union.

69 And Israel Colon repeated, yes, I did. And then Marty Zell told him he was fired. He had yelled out to me, he said Mr. Vega do you want the union.

And my words were yes I did want the union.

And then he told me I was fired.

Q. What did you and Colon do? A. Me and Colon -- then I changed my clothes and we were ready to go out.

I told Marty the exact words that Mr. Israel Colon said, but more or less --

Q. What was that? A. That we did not quit, we did not quit, we wanted to work, and that it was him that fired us, we didn't walk out.

Q. What did you do when you left? A. We went downstairs, made a phone call to Mr. Ralph Passman and we were going to the union hall.

Q. As a result, did you meet with Mr. Passman at the union?
A. Yes, we did.

Q. As a result of the meeting, what arrangements were made if any? A. We were supposed to go back at twelve o'clock with Mr. Passman and Eddie Pagan and of course Israel Colon and me to verify that we wanted to work, that we didn't quit.

Q. Did you meet with Mr. Passman and Mr. Pagan?

70

A. Yes, we did.

Q. After you met -- you met in front of the shop? A. Yes, we did.

Q. What did you do after the four of you got together?
A. We went upstairs. Mr. Passman spoke to Marty Zell about endorsing us back to work, and Marty Zell told him that it was out of his hands, there was nothing he could do about it.

Q. What did you do then? A. And then we all left.

Q. Did you get paid for that week -- for that day, that Thursday?
A. That day I did not.

Q. When is the normal pay period? A. Friday.

Q. Did you have to come back to get it the next day? A. Yes.

Q. What time did you come back to the shop the following day?
A. We were supposed to meet Mr. Eddie Pagan about eleven, around eleven thirty.

Q. Did you? A. Yes, we did.

Q. And your purpose of going back was what? A. To collect our pay.

71 Q. Did Mr. Pagan say anything to you? A. Yes.

He had said Marty Zell, the lawyer had spoken to him and Mr. Passman, that he wanted to endorse us back to work.

Q. And what did you do then? A. Me and Israel went upstairs and we told him, here we are.

And Marty told us, go back to work.

Q. Did you get paid for the whole week? A. Yes, we did.

* * * * *

74

CROSS EXAMINATION

Q. (By Mr. Horowitz) Mr. Vega, do I understand that you weren't present, you didn't hear directly of this meeting late in March with the -- of the union people with Zell up at the office, is that correct? A. Are you talking about -- which meeting now?

There were two meetings in March that I know of. One I was there with Israel Colon and the second I was not there. ***

* * * * *

75

Q. You have heard here that there was an occasion where union representatives, Mr. Passman, Mr. Pagan, came up to the office and spoke about union to Mr. Zell and you have heard that Mr. Zell said Mr. Zimbach wasn't there, they would have to talk to the boss, correct, did you hear that testimony? A. Yes.

Q. Were you personally present when that conference was taking place? A. The first one I was. The second one I wasn't.

JUDGE GOLDBERG: I told you to back up and start over again, Mr. Horowitz.

* * * * *

78 Q. (By Mr. Horowitz) Were you absent any of the working days of the last week of March of this year? A. Last week of March? I think so. I don't know for sure but I -- yes, as a matter of fact I was, because Israel Colon had told me that they had came up again. I was out then.

JUDGE GOLDBERG: Do you remember what day of the week you were out?

THE WITNESS: I don't know the day.

JUDGE GOLDBERG: Go ahead, Mr. Horowitz. It is your witness at this moment.

Q. Do you recall the day you came back after that absence and whether you had a conversation with Colon about working conditions or some proposal from Mr. Zell? A. Yes.

Q. Can you tell us in substance what that discussion was?

79 A. That Marty Zell had offered us a health plan, that if we would drop the union, that's what he offered.

Q. Did you ever say to Marty Zell, we are not so much interested in the union but we want better conditions? A. No.

Q. Did you go down to the union on that day with Mr. Colon? A. Yes.

Q. Had you or Mr. Colon in your presence said anything to Mr. Zell about going down to the union that day? A. Mr. Colon did.

Q. Right.

And do you remember what Mr. Colon said to Mr. Zell?

A. He told him he was going to go down.

Q. And? A. And speak to the union delegate. I don't know the whole statement. I don't remember it word by word, but that's more or less what he said.

Q. Did he say what he would say to the union delegate?

A. What -- hold it.

JUDGE GOLDBERG: Did he tell Zell what he was going to say to the union people?

THE WITNESS: No. Not that I know of.

80 Q. Do you recall on the following Monday, which was April the first, getting in on a telephone conversation between Mr. Passman and Mr. Zell? A. Yes. Yes.

Q. Can you tell us the substance of that telephone conversation as well as the people who were uttering it, what each one said?

A. Yes.

Well, Marty Zell had called Mr. Passman saying that me and Israel Colon wanted to speak to Mr. Passman.

Right. So Mr. Passman got on the phone and Marty told me to pick up the phone, so on one line it was me and Israel Colon, and then Marty -- I don't know if he hanged up or what -- we told -- Marty told Mr. Passman that we wanted to drop the union.

JUDGE GOLDBERG: That you wanted what?

THE WITNESS: That we wanted to drop the union.

A. And we did not want to drop the union. And --

Q. Is this last remark conversation? I'm simply asking you what the conversation was.

JUDGE GOLDBERG: Will you stick to what was said on the telephone at that time after Mr. Zell told Mr. Passman that the two of you, Colon and you wanted to drop the union, who spoke next and what did he say?

THE WITNESS: Mr. Colon spoke.

JUDGE GOLDBERG: All right.

What did he say?

81 THE WITNESS: He told Mr. Passman that we didn't want to drop the union.

JUDGE GOLDBERG: Who spoke next?

THE WITNESS: I did.

JUDGE GOLDBERG: What did you say?

THE WITNESS: I said I didn't want to drop the union either.

JUDGE GOLDBERG: Who spoke next?

THE WITNESS: Mr. Passman.

JUDGE GOLDBERG: What did he say?

THE WITNESS: He said, I don't know, that the union have already put some certificate or statement in and that that's not their policy, to just drop out like that, never to wait for the election.

JUDGE GOLDBERG: Did anybody else talk after that?

THE WITNESS: No.

Israel Colon told Mr. Passman that he knows all this, it is just to clear it up for Mr. Marty Zell's ears.

JUDGE GOLDBERG: Did anybody else speak after that?

THE WITNESS: Mr. Israel Colon did.

JUDGE GOLDBERG: After Mr. Colon finished talking, did anyone else speak?

THE WITNESS: No.

82 JUDGE GOLDBERG: There is your conversation, Mr. Horowitz. Go ahead.

Q. Do you recall whether Mr. Passman said anything like, if they don't want the union, they can vote no? A. Yes.

Q. Did he say anything like, it is too late, it has already been filed? A. Yes. I did mention that in my statement before.

Q. And this is Monday, the -- A. April first.

Q. The first.

* * * * *

83 RALPH PASSMAN

having first been duly sworn, testified as follows:

DIRECT EXAMINATION

86 Q. (By Mr. Trunkes) Now, after you received the -- the union received those cards, did you take steps to speak to the employer, Zim Textile? A. Yes.

We made arrangement notifying the workers, we always do, that we were going to approach the employer for union recognition.

Q. Did you do that? A. We did that.

Q. When did you first go to the employer's establishment?

A. I believe it was around March 28th.

Q. Did you meet anybody there? A. We presented ourselves to Mr. Zell.

Q. Who is "we"? A. Eddie Pagan and myself.

Q. Where was this? A. In the premises of the company, in a little small office.

Q. What time of day was this? A. I would say about 10:30, 11:00 o'clock.

Q. Did you meet with Mr. Zell? A. Yes, I did.

Q. Would you tell us the conversation you had with him?

87 A. I presented myself as the general organizer of District 65 and that we were approaching the company for union recognition.

Q. What did Mr. Zell say to that? A. Mr. Zell said that he is not the employer, the employer was away, and he would be gone for about a week.

I left my card saying that he should get in touch with me as soon as the employer returned.

Q. Now, did you take any other action relating to this situation shortly thereafter? A. No. We didn't do anything until, I guess it was on April third, when I filed a petition for an election.

Q. Prior to the filing of that petition for an election, did you have any conversation with Mr. Zell on the telephone? A. Yes.

I got a call from the company stating that the workers wanted to speak to me.

Q. When you say "from the company" who spoke to you?

A. Mr. Zell.

Q. Tell us of the telephone conversation. A. The conversation went like this.

88 The workers wanted to speak to me because they wanted to change their minds about joining the union, and I said, well, let me speak to the workers.

And I spoke to Colon and Vega. I don't know who first.

And I asked them, is it true?

They said no, they are not looking to get out of the union.

And I said to them that, well, I filed --

JUDGE GOLDBERG: Stick to the conversation, please, Mr. Passman.

A. The question that they wanted to change their minds, and I said that there was no way that the union would withdraw at this time.

JUDGE GOLDBERG: Wait a minute.

I'm not sure that you are clear.

What did you hear on the telephone?

THE WITNESS: By Mr. Vega or Colon?

JUDGE GOLDBERG: By someone who is not Mr. Zell.

THE WITNESS: Right.

They said that they did not change their minds about joining the union.

JUDGE GOLDBERG: How many different voices told you that?

THE WITNESS: Two.

89 Q. What did you say about filing? A. I had told them that we filed for a -- an election and that if they had changed their mind, they would have to vote no.

* * * * *

90 Q. I think the date stamp you'll note is April 3rd on the petition, is that correct? A. Right.

Q. I think the hour is also mentioned? A. Yes.

Q. 11:02 a.m., is that correct? A. Yes.

Q. The conversation you had on the telephone, did that occur after you filed this petition, this paper, or did it occur before you filed the paper? A. I believe that was after I filed.

Q. Was it the same day, April 3rd, to your knowledge?

A. I would say so, yes.

Q. Now, --

JUDGE GOLDBERG: Is that your best recollection?

THE WITNESS: Yes, Your Honor.

* * * * *

91 Q. What were you told on April 4th? A. That Mr. Zell had fired both Colon and Vega.

Q. Did you take steps to do anything about it? A. We asked Mr. Vega and Colon to come to the union.

Q. And then did they come? A. We met.

And we made arrangements to go back to see if we can get the workers reinstated, with Mr. Pagan.

92 Q. By the way, the first time that you went to see Mr. Zell on March 28th, was Mr. Pagan with you at that time? A. Yes.

Q. Getting back to this April 4th, did you meet later on that day with Mr. Pagan and the two workers? A. Yes.

Q. Did you go to see Mr. Zell? A. Yes, we did.

Q. Will you tell us the conversation? A. We went into the company's premises and I asked Mr. Zell, who was present, to reinstate the two workers, because I thought that he was committing an unfair labor practice, and I thought that he was doing the wrong thing, and Mr. Zell said it was out of his hands and the company's policy stood, that they were both discharged.

Q. What did you do then? A. After another couple of words, we left.

Q. Did you receive a communication later that day from any of the representatives of the respondent? A. Mr. Zell then called me.

Q. When was that? A. Later, the later part of the date.

Q. What did he say? A. That they reconsidered and would take both Vega and Colon back.

Q. As a result of that, did you give any instructions to Mr. Pagan or anyone else? A. Yes, I had told Mr. Pagan that he was going to meet the two workers that morning to tell them that they are going to go back to work, that they are reinstated.

Q. Did you meet with the workers when they were reinstated?
A. No.

Q. Mr. Pagan took care of that end? A. Yes, he did.

* * * * *

CROSS EXAMINATION

Q. (By Mr. Horowitz) Mr. Passman, are you certain that March 28th was the very first time you were up to Zim's office on union business? A. That's the best of my recollection.

Q. Is it possible that within, let's say, a month of that date, prior to it, that you had paid an earlier visit to the office with Mr. Pagan? A. For the similar purpose, are we talking about?

Q. For any purpose? A. It could be. I couldn't say that I did.

94 Q. When you say "could be" do you have any recollection in your mind that formulates an earlier conference? A. No.

Q. That it might have been at that time that you left a card and asked for Mr. Zim to call you back, does that remind you of anything? A. I did it once, that's all I'm saying. The question is was it the 28th or earlier, I really don't know.

JUDGE GOLDBERG: Are you testifying that you were at that office of Zim Textile just once?

THE WITNESS: Yes.

JUDGE GOLDBERG: On what do you base your partial acquiescence in counsel's suggestion that you might have been there before?

THE WITNESS: Well, only that in seeking the question of what happened between the period that -- when the employer said that he

wasn't in, whether or not there was a second meeting or a second approach to the company.

JUDGE GOLDBERG: Subsequent to the time when Mr. Zell said that the boss wasn't there.

THE WITNESS: Right. It could have been, possibly.

JUDGE GOLDBERG: Go ahead, Mr. Horowitz. I'm trying to help you. I'm trying to help the case. I'm trying to help the cause of the search for truth.

But it is your job, go ahead.

95 Q. In any event, at either meeting, assuming they have any recollection of an earlier meeting, did Mr. Zim call you back?

A. No.

Q. Zimbach I meant.

JUDGE GOLDBERG: Mr. Zimbach, not Zelbach.

MR. HOROWITZ: That's right.

Q. Did Mr. Zimbach call you back? A. No.

Q. Would it refresh your recollection if at the first meeting you said that you represented the boys, does that sound as though it is something that might have happened at an earlier meeting? A. Not that I know of.

JUDGE GOLDBERG: The witness shrugs and says that he doesn't know.

Q. You have given us your testimony as to the meeting on March 28th? A. Yes.

Q. At that time, were either Mr. Colon or Mr. Vega nearby, to the best of your recollection, that is, near to the office that you were in? A. They were not in my sight on that day, no.

Q. Did you make any offering to show cards? A. No.

96 JUDGE GOLDBERG: That word was cards, was it not?

MR. HOROWITZ: Yes.

Q. You merely asked for Mr. Zimbach to get in touch with you, correct? A. No. I didn't know the employer's name. I asked

Mr. -- when Mr. Zell said that the employer would be gone for one week, I asked him to have him get in touch with us, that I did say, yes, but not by name, as I said. I didn't know.

Q. Did you say anything at that time about having to file?

A. No.

* * * * *

97 Q. Now, in this telephone conversation wherein Zell and Messrs. Colon and Vega spoke to you on the telephone, this telephone conference, as it were, did you say anything about it being too late to pull back the petition? A. I don't recall those words.

Q. Now, did you ever claim to have cards for all three employees, non-supervisory employees? A. No.

Q. I'll show you the last lines of page 77 and the first two lines of page 78 and ask if this is a correct copy of a statement made by you in a representation proceeding.

JUDGE GOLDBERG: Have you read the lines designated by counsel?

THE WITNESS: Yes.

JUDGE GOLDBERG: Were you asked that question and did you answer it as it appears in that record?

THE WITNESS: No. It would be an untrue statement. That's all I can see.

98 JUDGE GOLDBERG: I don't care whether the statement itself is true or untrue.

Were you asked the question that appears there and did you give the answer that appears there?

MR. TRUNKES: Your Honor, there is no question, it is a closing statement made by Mr. Passman at the end of the R case here.

They asked for his statement of position. He is now stating a position.

JUDGE GOLDBERG: Mr. Passman, let me put it this way. Have you read -- how many lines on page 77, Mr. Horowitz?

MR. HOROWITZ: Two.

THE WITNESS: One, it is one.

JUDGE GOLDBERG: Let's not get into anything over that. Let me look at that.

THE WITNESS: Yes.

JUDGE GOLDBERG: Page -- line 24, page 77 starts: "Mr. Passman: Yes." And then he proceeds on the 25th line and the first and second lines of page 78.

Mr. Passman, did you say at the representation case hearing what appears on that record?

THE WITNESS: Yes.

JUDGE GOLDBERG: Go ahead, Mr. Horowitz.

99 Q. Did you in fact have three signed authorization cards?

JUDGE GOLDBERG: Mr. Horowitz, if you want to make something out of that, you better read it into the record.

I put it before the witness with what I thought was a clearer question than had been presented to him.

I did not read it for its contents. If you have any desire to bring it to my attention, you had better read it now that the witness has identified it and said he made the statement.

MR. HOROWITZ: The statement identified by the witness reads as follows: "I would like to state that the approach of the union on behalf of the unit was made after three employees had joined the union."

JUDGE GOLDBERG: All right. I've heard it.

MR. HOROWITZ: And the question now is, was that a true statement.

THE WITNESS: No.

Q. (By Mr. Horowitz) Did you ever make verbal demand, other than what appeared in I believe it is Board Exhibit 3, in any event,

the petition in the representation case, the petition in that proceeding, for a unit inclusive of warehouse employees and office clericals?

A. Outside of that petition, no.

100 Q. Getting back to this telephone conversation, I believe you testified that you hadn't seen these people that week, is that correct, that is, Vega and Colon or either -- both or either after Thursday, March the 28th for the balance of that week? A. No.

Q. Would it be possible for that telephone conversation to have occurred on Monday which was April the first? A. No.

Q. You mean to say that you are very certain that it was on April 3rd, which was the same morning that you signed and filed the petition.

* * * * *

A. I'm pretty sure it was the same day.

* * * * *

101

REDIRECT EXAMINATION

Q. (By Mr. Trunkes) Mr. Passman, you stated in the reading of the statement from the transcript that it was not a true statement.

I'll show you the transcript again.

Would you please tell me what was not true about the statement that you made? A. The words "After three employees had joined the union."

Q. What -- A. It is two. Two employees had joined the union.

Q. Please explain why you said three. A. No, I really don't know.

Q. Did you mean to say three at the time you said it? A. I doubt it. I would not have made an incorrect statement based on we only had two cards. To say we had three is an incorrect statement.

Q. Do you remember saying three?

Just because it says it there? A. No.

Q. No what? A. No, I don't remember saying three.

Q. You are saying the statement is incorrect as three?

A. That's right.

102 Q. Do you recall making that statement? A. I don't see how I could, but it is written here, so I'm taking it for its word.

JUDGE GOLDBERG: The witness affirmatively testified that he did make the statement, that it was correct.

Of course I'll take his testimony at face value. I don't know how important it is. It may be important. Don't let me mislead you.

MR. TRUNKES: I'm asking the witness, and I think the witness is clarifying for me, Your Honor, -- the witness stated -- well, it must be so because it is there.

I think you are aware in holding many hearings, I'm aware certainly, many times the court reporter or the transcriber of the record does not make a completely accurate record, there are mistakes.

JUDGE GOLDBERG: Still it is prima facie correct.

MR. TRUNKES: I'm asking the witness did he actually say that he had three cards.

MR. HOROWITZ: At this point, Your Honor, I'll note that that question was asked and answered.

JUDGE GOLDBERG: I don't know how many times you want to go over it.

The witness is not certain. I heard his testimony.

If you want to ask a few questions on it, I'm not going to prevent you, but I have certain views upon it right now.

103 Q. Mr. Passman, did you ever sign up three people?

A. No.

Q. You knew you had signed up only two, is that correct?

A. Right.

Q. You had no reason to have said three at that time?

A. That's correct.

Q. To your recollection, did you say three at that time?

A. I have no recollection of saying three.

* * * * *

114

MARTIN ZELL

having first been duly sworn, testified as follows:

* * * * *

115

DIRECT EXAMINATION

Q. (By Mr. Horowitz) Are you an employee of Zim Textile Corporation? A. Yes.

Q. In what capacity are you employed? A. Manager.

JUDGE GOLDBERG: Mr. Horowitz, can I have a statement in the nature of a stipulation from you concerning the ownership of the respondent?

Is Mr. Zimbach the sole owner? It is a corporation, I believe.

MR. HOROWITZ: Zim Textile Corporation is a New York Corporation, I would propose as a stipulation, owned exclusively by Morris Zimbach, who is also the sole officer of the corporation and the boss, as that term is commonly understood.

JUDGE GOLDBERG: All right. It simply makes a more complete and neater decision when I can state the basic facts.

Mr. Zell is now the manager and we have -- we are ready to proceed.

Q. Are you the sole manager of the business? A. No. I am one of the two son-in-laws, Jerry Mockson, M-O-C-K-S-O-N, is another son-in-law of Morris Zimbach and we share responsibilities.

116

JUDGE GOLDBERG: How do you share them?

THE WITNESS: He is primarily on the outside handling sales and whatnot and I'm on the inside handling office and warehouse as well as sales.

MR. HOROWITZ: Is Morris Zimbach frequently physically present at the premises?

A. He is on the premises I would say about ten percent of the time.

Q. What, briefly, is the business of Zim Textile Corporation?

A. We purchase sheets and pillow cases, towels, blankets and bed spreads from various manufacturers, mills located primarily in the South and in turn wholesale or job them to small retail outlets primarily within the metropolitan area.

The commodities as mentioned are primarily first quality merchandise in sheets and towels, first quality in bed spreads and second quality or irregular quality merchandise in towels and blankets.

* * * * *

123 Q. Can you recall the time of your earliest conversation with Colon with respect to the conditions of his work or benefits or whatever? A. Well, as I recall, I only spoke with Colon about any sort of a benefit whatsoever.

* * * * *

A. Well, the first occasion was with Colon. It was some time in December, not too much before Christmas. I was told at that time that his wife had just gotten a job and we were discussing it en route to him
124 picking up his wife. I had my car in the city and his wife at the time was working on Fifth Avenue in and around 42nd, 44th Street. It was snowing out and I offered him a lift to that area because I was going up to 37th Street to see my brother.

At the time he told me that his wife had just gotten a job. I don't recall whether it was a training job or not. I don't think it is important. And that he was now not eligible for Medicaid benefits or Medicare benefits, I don't know the difference between the two.

* * * * *

125 THE WITNESS: Comments was now that his wife had a job and was working, she have not available -- she could not take advantage of these benefits, these Medicare or Medicaid benefits, which again I don't know and that if anything happened to her or his children or to him he would not be eligible for the government or state or whoever it would be to take care of him medically.

I told him at that time that we had Blue Cross, Blue Shield in the place. I had offered it at the time to place him on Blue Cross, Blue Shield.

I also made it known, and this is a policy of Blue Cross, Blue Shield, that they only have anniversary dates and since our group was signed up on the first of July of 1970, that our anniversary date is July first, and this past July first was the only time that I may or could have placed him on that.

JUDGE GOLDBERG: Did you tell him all of this while you were driving up Fifth Avenue in the snow storm that day?

THE WITNESS: That's right.

I told him that on the anniversary date I would put him on Blue Cross-Blue Shield. ***

* * * * *

126 Q. Do you recall the next time you -- or was there a next time that you discussed medical benefits or wages or whatever?

* * * * *

A. ***the only other time that I discussed any sort of a medical or not even monetary as much as medical, or pension benefit was the afternoon of March 28th, which was only with Mr. Colon. He was the only employee in that day. It was the afternoon after Mr. Passman and Mr. Pagan had left.

JUDGE GOLDBERG: The same day but in the afternoon?

THE WITNESS: Yes. The events --

* * * * *

128 Q. At any time in November into January until the time of Vega's raise, was any discussion had between you and either of those two gentlemen or both with respect to joining unions or unionisms or consequences? A. No, not one word.

Q. Are you suggesting that the conversation -- the testimony that was given by Messrs. Colon and Vega in that respect is untrue? A. Yes.

Q. Now, when did District 65 as a union first come to your attention in relation to them? A. Well, the first time that they came was either the last week of February, and I believe it was the last week of February rather than the first week of March -- Passman and Pagan first walked in. They came around to my desk. Passman gave me his card, told me that he was with District 65, and I didn't know who District 65 was or, you know, what it represented.

I asked him if I could help him.

He said, well, the boss is always the last to know. You boys signed up for our union and we would like to speak to the president of the company.

I informed him -- he assumed that I was a principal of the corporation.

129 I informed him that the president of the company was not around and that I would have him get in touch with him, and I ushered him to the door.

Q. Did he leave a card at that time? A. Yes, he left a card and I left it with Mr. Zimbach.

JUDGE GOLDBERG: You left it with Mr. Zimbach?

THE WITNESS: I left it on his desk for his return.

JUDGE GOLDBERG: Please keep your voice up.

THE WITNESS: I left it on his desk for his return.

Q. Did you discuss it with Mr. Zimbach? A. No.

Mr. Zimbach and I don't talk very much. We don't get along very well.

Q. You mean you didn't tell him this gentlemen left a card?

A. Yes, I did.

I said he would appreciate a telephone call from you and that was the last that I discussed it with Mr. Zimbach until April 4th.

* * * * *

130 Q. Following this visit of the last week of February or possibly the first week of March, did you address any inquiries or have any conversation with either Mr. Colon or Mr. Vega or both of them?

A. No, I didn't.

JUDGE GOLDBERG: You had some conversations. You work with him. Why don't you wait for counsel to finish his question?

You might be able to answer it better.

Please finish the question.

Q. With respect to unions and more specifically District 65?

A. No, I didn't.

* * * * *

132/133 Q. What was the next occasion with respect to District 65?

A. The next occasion was the 28th of March. It was a Thursday afternoon. Vega was not in for the full day. He had taken the day off. Colon was down to lunch. Passman and Pagan had come in between the -- one lunch break, again introduced himself, wanted to see the president of the corporation.

I told him again that the president wasn't around. He left his card and as he was going through the door with Pagan, he said that -- he made the comment, well, I see that we are going to have to file, and they left.

That was the next time.

* * * * *

Q. Are you certain as to the date and time? A. Yes.

Q. Would you tell us what date it was? A. The date again was March 28th, it was a Thursday. I remember it very, very well.

Q. Did you have any conversations with any employees later that day? A. Yes.

That afternoon, when Colon came back from lunch, I went into the back and I attempted to find out what was going on. Nobody had --

JUDGE GOLDBERG: Wait a minute.

134

What did you say to Colon?

THE WITNESS: Well, I sat down with him and I asked him if he could explain what was happening with this union thing because I had not spoken to him about it or anybody about it for that matter.

JUDGE GOLDBERG: What did he say?

* * * *

THE WITNESS: I was told he decided to join the union because of the benefits the union was going to give them versus the fact they didn't have any benefits at Zim Textile, as an example, three thousand dollars worth of a life insurance policy or major medical or hospitalization benefits and the fact that if they were laid off or were fired that they would have a job, that the union would get them a job.

JUDGE GOLDBERG: Who told you all of this?

THE WITNESS: This was told to me by Colon.

Vega was not in that day.

JUDGE GOLDBERG: Go ahead.

135

THE WITNESS: I attempted to show Colon what I had been working on for the last year and a half prior to that with respect to a pension fund which would include the employees because of government regulations, naturally, -- no?

JUDGE GOLDBERG: No, I'm just amused.

THE WITNESS: There was a five thousand dollar insurance premium -- insurance policy for the employees, they would have -- I

tried to explain investing to them. I explained to him as I've promised and I've always maintained and kept my promise to him, that July first he would go on the Blue Cross-Blue Shield package that the corporation had.

He in turn at that point told me that this whole thing came about because his wife had just gotten a job or was working for a union and that she was explaining to him all the benefits and deals that the unions had for the employees.

I at the time said to him, well, why don't you go home and discuss this with your wife. Show her. I showed him all of our plans, all of our packages that I had been working on in front of witnesses, I might add.

136 He thought they were interesting enough for him to comment to me that, well, they don't really want a union, what they are looking for -- meaning he and Vega -- is the benefits or something that, you know, they could put their fingers on rather than a job.

I explained to him, speak to your wife about it, see what she had to say.

And the next day, Friday, when Vega came in, that he should sit down and discuss it with Vega, and if he felt that he didn't want a union, that what they wanted was the benefits, go down and see what this filing that Passman and Pagan had done was all about.

The following morning the two of them had come in. They sat in their room for about a half hour or so discussing it.

I came in and asked them what their discussion was and Vega again confirmed what Colon had said to me the previous day, that what they were really looking for were the benefits, insurance policy, not just a stinking ten dollars raise.

They agreed that morning that on their lunch break they would go down to the union to see Passman and Pagan and tell them that they decided, that they changed their mind, that they didn't want to join the union and they would go along with me.

* * * * *

137 THE WITNESS: I gave them during the lunch hour the time to go down to see them.

They took about two hours or so.

When the two of them returned Friday afternoon their comment to me was --

JUDGE GOLDBERG: Who said to you what you are about to tell us?

THE WITNESS: Colon.

JUDGE GOLDBERG: What did Colon say?

THE WITNESS: Colon said, don't worry, it is taken care of, meaning that --

JUDGE GOLDBERG: Not what it means. Is that what he said?

THE WITNESS: Yes, that's what he said.

JUDGE GOLDBERG: Did Vega say anything?

THE WITNESS: I don't recall. I think he was speaking for the two of them.

138 JUDGE GOLDBERG: What did you say?

THE WITNESS: I had told them --

JUDGE GOLDBERG: No, no, what did you say to Colon and Vega at that time?

THE WITNESS: I asked them if Mr. Passman was going to forward me the letter and the assurance that they would not -- this so-called filing, put through this so-called filing and again he reassured me of the fact that, don't worry, it is being taken care of, it will now, why I sat here --

JUDGE GOLDBERG: I haven't been asked why?

THE WITNESS: Sorry.

* * * * *

139 Q. (By Mr. Horowitz) *** Can you tell us the time, date, day and place where you next spoke to any of the employees or union

representatives with respect to this particular matter? A. The next time was the morning, I would say about 9:30. Vega and Colon both --

JUDGE GOLDBERG: What date?

THE WITNESS: Monday morning, April 1, April Fools Day. ***

* * * * *

140 A. They had come in. I had mentioned to them the fact that the morning's mail didn't bring a letter from Mr. Passman with respect to the cancelling of his filing that he had threatened on Thursday.

I questioned them as to what the reason was for not receiving it.

* * * * *

Q. ***What did they say or do? A. They just ignored it, didn't say anything.

Oh, I'm sure it will be taken care of. For some reason it just wasn't enough for me.

I in turn that morning called Passman's office. He wasn't in. I left a message for him to please contact me.

I received a call back from Mr. Passman at about 11:30, a quarter to twelve, just prior to the two boys going out to lunch.

At the time, again in front of witnesses, Mr. Passman was on his phone, I was on a phone in the warehouse, Colon was on the phone in the office, Vega was on a phone in the warehouse.

I had asked Mr. Passman the reasons for my not receiving the letter that I understood was forthcoming.

141 He told me that it was too late for him to stop this filing, the date again being April 1, Monday, and that the only thing that I would have at this point would be if the boys honestly felt that they didn't want a union, that all they had to do was vote no at the election time in about a month or so.

JUDGE GOLDBERG: What did you say?

Did you say anything on the phone at that point?

THE WITNESS: I had asked -- again I had asked Mr. Passman why I didn't receive this letter and he informed me of that.

The two boys, on the other hand, Colon and Vega, were just listening into our conversation. They really hadn't said anything except for the fact -- they are just listening.

I hung up from Passman. The two of them had gone out to lunch. And that was it.

It was forgotten about for the rest of the day.

Q. Another question.

In the course of that conversation, did either Mr. Vega or Mr. Colon or both of them say in this conference --

JUDGE GOLDBERG: Did they say anything, before you start characterizing, did they say anything?

142 THE WITNESS: No. They were explained to by Mr. Passman that if they decided that they didn't want a union, that they would vote no, but that it was too late for him to stop this filing.

* * * * *

Q. Both Colon and Vega have testified that they said in the course of this conversation that they are for the union.

Did you hear any such utterance over the telephone? A. No, they never said that over the phone. ***

* * * * *

143 Q. What time did you get to the office on Thursday, April the fourth? A. Somewhere around 8:15, which is a normal time for me to arrive, 8:15, 8:30.

Q. Did anything arrive in the mail? A. Yes, a letter from the National Labor Relations Board.

* * * * *

145 Q. I ask you if they were the enclosures which you received in the mail on the morning of April the 4th, 1974? A. Yes, they were the same type of documents.

JUDGE GOLDBERG: Is that a copy of the document received to the best of your recollection?

THE WITNESS: Yes, exactly, sir.

JUDGE GOLDBERG: All right.

What do you want to do with it, Mr. Horowitz?

MR. HOROWITZ: One is the board's exhibit, I believe 3, the petition.

* * * * *

MR. HOROWITZ: And the covering letter I would make Respondent's Exhibit 4.

* * * * *

146 Q. When you received these, had Colon and/or Vega yet reported for work? A. No.

Q. Did you do anything with respect to it? A. Yes.

Q. What did you do? A. I called Sidney Danielson.

JUDGE GOLDBERG: Sidney Danielson, the Regional Director. Go ahead.

A. I called Mr. Danielson to ask him what all of this meant and to get some sort of an opinion as to what he --

JUDGE GOLDBERG: Did you reach somebody?

THE WITNESS: Mr. Danielson.

JUDGE GOLDBERG: You reached Mr. Danielson.

THE WITNESS: Yes. I spoke to him directly. I told him I was under the impression that this had already been filed prior to April 1 and that I noticed that on -- that these papers, documents were filed prior, and I notice that there is a date of April 3rd, Wednesday, the day before I was calling him.

I asked him whether this was something I had to concern myself about, and his comment to me was, well, before you get yourself into any problems here, I would suggest you contact an attorney.

147 And I said, well, I was under the impression that I wouldn't need an attorney for something like this, that it was just an election.

He said it is a little bit more involved than that, and I would suggest, as I said before to get yourself an attorney.

I attempted to ask him another question and he made it very pointed to me that I should not discuss this any further with him and an attorney was something that I needed.***

* * * * *

Q. Now, did Mr. Vega and/or Colon show up?

Which was the first of them to show up? A. Vega came in earlier than Colon. I said absolutely nothing to him. He went directly to the bathroom where they change and he started to change his clothes.

148 Q. Who came in after Vega? A. Colon. I questioned Colon as to what had happened here. I showed him the documents and I told him that these weren't filed until April 3rd which was the day before yesterday, and I had gotten a little excited because in my mind I was told I would have to get an attorney, we are talking about thousands of dollars and I voiced my opinion to him in anger, that what you have done here, -- my comment was, what you have done here, which was supposed to have been apparently strained out and not go this far is now going to cost thousands of dollars, and at that point, because I had raised my voice and was in anger, he smashed his hand down on the desk and screamed out that he wants a union, I don't give a shit, I want a union-type of comment.

I questioned him about it. I said, you mean you want a union here?

And he said, yes.

I said, well, then, you are fired. I didn't wait for my father-in-law to come in and fire him. I fired him on my own.

Then I walked into the bathroom where Vega was and I questioned him as to what his feelings were about the union, and he in turn gave me the same answer, yes, he wants a union, and I said, well, then you are fired, too, get out.

They both left within fifteen minutes.

JUDGE GOLDBERG: Next question, Mr. Horowitz.

149 Q. What was the next incident that happened after you had fired Vega and Colon? A. Later that morning, probably around 11:00, 11:30, a couple of hours after this incident, Passman and Pagan, Colon and Vega showed up at our office and in front of witnesses again requested the reinstatement of Vega and Colon, Mr. Passman did.

I did tell him that it is out of my hands, he would have to speak to my attorney and I'll see him in front of the National Labor Relations Board, and there was nothing I could do.

At that point, I did not have an attorney.

JUDGE GOLDBERG: Did you say anything else?

THE WITNESS: No. They left.

JUDGE GOLDBERG: Did they say anything?

THE WITNESS: No, nothing at all, except that he pointed out that what I --

JUDGE GOLDBERG: Who pointed out?

THE WITNESS: Mr. Passman.

JUDGE GOLDBERG: What did he say?

THE WITNESS: That what I had done was an unfair -- was illegal, was an unfair labor practice, and that was it, and then they left.

JUDGE GOLDBERG: Next question.

150 Q. Did you retain counsel that afternoon? A. Yes, I finally got in touch with you through a friend of ours and I guess it was around mid-afternoon that you suggested that I contact Mr. Passman and

recommended, since I had no telephone number for the two individuals that I fired, that he try to get in touch with them and ask them to return to work the following day, which they did.

Q. Did Zimbach pay them for the whole week? A. Yes, Zim Textile paid the two individuals for the full week.

* * * * *

152 MR. HOROWITZ: Since April the fourth, and the reinstatement of -- or, rather the return to work and payroll of April the fifth, have you begun anything to undermine the union's position?

JUDGE GOLDBERG: That's conclusionary.

Well, I suppose there is no other question you can ask.

Go ahead. I withdraw what I said.

Did you hear the question?

THE WITNESS: Yes, I did.

Q. Have you done anything to undermine the adherence of your employees to the union? A. Not to my knowledge, no.

* * * * *

166 JUDGE GOLDBERG: Did you hear Vega's testimony about the conversation at the time you laid him off?

THE WITNESS: Yes.

Q. Was that substantially correct? A. Yes, it was correct.

Q. Was the reason for the lay-off lack of work? A. Yes.

Q. Was it motivated in any way by Vega's activities on behalf of the union? A. Not at all.

167 We decided some time in early February that after the 40 foot trailers, March 26, March 27, were completed, and after the re-counting and stacking and piling and reorganization of our inventory in the New York warehouse was complete some time around early April, mid-April for an inventory later in the month of April to complete our fiscal year, that Nelson Vega would be laid off.

* * * * *

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26 Federal Plaza
New York, New York
July 11, 1974

* * * * *

207

CROSS EXAMINATION

* * * * *

208

Q. (By Mr. Trunkes) Now, you stated that the first conversation that you had with Mr. Colon was in December 1973 involving medical benefits, Blue Cross, etc., and the second conversation you had with him was after the union representatives came to the shop March 28th. A. Right.

* * * * *

Q. Now, after the union made their appearance -- I believe you stated the union made their appearance on two occasions.

A. That's right.

Q. And the first one was some time in February? A. Late February.

* * * * *

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Q. ***Mr. Passman stated they represented the two men in the back, is that right?

* * * * *

Q. What was the reason why you spoke to them, with Colon after the second visit as against not speaking to anybody after the first visit?

* * * * *

A. The second time, which was the afternoon of March 28th, I thought that I should find out what was happening, what was going on and

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what Mr. Passman was referring to about, well, I see we have to file.

Prior to that, as I said before, I couldn't give a damn what happened at Zim Textile. That was my attitude.

* * * * *

211 Q. From January 21st, as I understand what you testified to, you were working a nine to five day and you really didn't give a damn as to the operation of the business, correct? A. That's right.

Q. Okay.

212 Now, on March 28th, you obviously did give a damn because you did speak to Colon, correct? A. Correct.

Q. What time between January 21st and March 28th, did you begin to once again care for the operation of the business? A. As soon as Mr. Passman and Mr. Pagan walked out on the 28th.

JUDGE GOLDBERG: You mean that was your first flair-up of interest of what was going on around you?

A. That was the first time it became apparent to me that if somebody wasn't going to find out or take any action in finding out what was happening with the union, that we would -- my thinking at the time was that we would have a union and my father-in-law being seventy years old not caring and me about thirty-three years old and caring, that I started to feel a little differently.

* * * * *

213 Q. When you spoke to Mr. Colon after Mr. Passman was in the shop, you asked him what the story was so to speak, is that correct? A. Yes.

Q. And he told you he wanted certain benefits? A. Yes.

Q. Including hospitalization. And you mentioned you were prepared to give him some benefits at that time? A. No.

Q. Was it the next day you discussed it? A. No.

Q. Well, didn't you discuss with him the Blue Cross policy of the company? A. As I stated, I never said that I was prepared to do anything. We had been working since February of '73 on placing a pension plan into the operation of the business. Nothing had been approved and I wasn't prepared to make any guarantees to anybody, least of all myself, that we would have a pension plan, which as of today we still don't have.

What I had promised Mr. Colon and not Mr. Vega was the day that I drove him to meet his wife, that the next anniversary date of our Blue Shield Blue Cross policy, which he knew full well was July first, I would instate him -- I would place him into that policy.

214 And at the March 28th meeting that we had the conversation about what I was attempting to do with pension plans, what I was attempting to do with Major Medical and insurance policies and what I had also mentioned to him about Blue Cross Blue Shield, was all part of my conversation with him, but no guarantees.

Didn't you state to -- or, did you state to Mr. Colon during this conversation that the reason why you were not putting him into the Blue Cross plan was because of the union matter? A. No, not at all.

Q. Didn't you state to him that you didn't put him in the plan because of the start of the union thing? A. No, I made it very clear to Mr. Colon that if a union did come into Zim Textile, that any Blue Cross, pension, or profit sharing or any other plan that we might institute, he would probably not be able to benefit from because the union themselves have their own health and welfare and pension plans and whatnot.

Q. Did you state to him that you put the office clerical employee in the Blue Cross plan, did you not? A. Yes, she was in it.

Q. When did you put her in? A. When she was hired.

215 Q. When was that? A. October. She went in November first.

Q. And you didn't put her in March of '74? A. No, there was no need to. According to Blue Cross, if your -- if you have been a member of Blue Cross Blue Shield and you join another company, you can immediately go into that company's policy.

If you have never been a member of Blue Cross Blue Shield, you must wait for the anniversary date of that group policy. I didn't make the rules.

Q. Did you tell him that according to federal law all employees must be included in the pension plan? A. Well, that's a fact.

Q. Did you tell him that? A. Yes.

Q. Did you explain to him what vesting meant? A. Yes.

Q. And you showed Mr. Colon the Blue Cross and pension plans that you had, did you not? A. I had showed him the Blue Cross and the pension plans that we had been discussing, there were four of them.

Q. After you showed him these plans, Mr. Colon stated to you that he didn't really want -- he really wanted the benefits, he didn't want the union, is that correct? A. Well, he said to me prior to my

216 showing him all these figures and facts.

Q. That this is the reason why he went to the union, he wanted benefits, you weren't giving benefits, so he decided he wanted to get a union to help him get benefits.

* * * * *

A. Would you repeat the question?

Q. Yes.

Either before or after you explained and showed him your plans, he told you that what he really wanted was to be included in the company's benefits, he didn't care to have a union, he wanted to have the benefits, and therefore once you told him okay I'll give you these benefits, he led you to believe that he would leave the union, did he not.

A. Yes, right.

Q. And you spoke to Mr. Vega also about this, or did you?

A. I never directly spoke to Mr. Vega about that. I left it for the following morning, if Mr. Vega came in, that Colon would discuss with him what we had discussed the prior afternoon.

217 Q. Right. A. And if they both agreed that they sincerely didn't want the union and they would go along with me as far as what I had shown Mr. Colon, that --

Q. Right.

JUDGE GOLDBERG: Let him finish.

Then what?

A. That was the conversation. I never spoke to Mr. Vega about any of those facts. I never showed him any of the pension plans and I certainly never promised him that I would put him into the Blue Cross Blue Shield plan because at that point we had already known that by the time the inventory was complete he would no longer be with us, which was only a couple of weeks later, as it turned out.

From the 28th on a Friday to the 11th on a Thursday is two weeks. So there was no need to discuss with him the possibilities of placing him in a Blue Cross Blue Shield plan.

Q. Did you tell Mr. Vega on March 29th he would no longer be working there after a week or two? A. No.

Q. Did you ever tell him that he wouldn't be working there until April 11th? A. No.

218 Q. In other words, in your mind, you knew that he was he was not going to be working there after a short period so there was no need for you to discuss this pension plan with him or Blue Cross plan, is that correct? A. That's correct.

Q. The next day, on March 29th, when Mr. Vega and Mr. Colon came to work, they had a discussion among themselves, did they not? A. Yes.

Q. Didn't you join that discussion? A. No. The only thing that I did was after possibly a half hour after them sitting in the changing

room, I came in and I asked them if they had reached some sort of a decision, and at that point Mr. Vega stated that what he was really looking for were benefits rather than to push a union down our throat type of conversation.

I also made mention of the fact that he really wasn't -- he wasn't -- the exact words I don't remember, but there was reference to not just getting thrown a stinking ten dollars a week raise which he had gotten some time around the end of February.

Q. Didn't he also say he wanted job security?

* * * * *

219 A. I don't recall those words. I do recall the facts that I had presented.

Q. Now, during that particular conversation on March 29th, didn't you tell them -- didn't you ask them to trust you and to be willing to work with you and if they were willing to do this, they should go down to the union and tell the union they changed their minds and didn't want the union anymore?

Didn't you tell them that? A. That was what was agreed upon, yes.

Q. You did tell them that. You say that was what was agreed upon? That's what you told them to do, didn't you? A. I didn't tell them that. I told them in our conversation that if they had decided after

220 Colon had gone home that evening to speak to his wife about what I'd shown him, and after he and Vega had discussed in the morning that they really didn't want the union and that they wanted to have pension plan or the insurance or whatever else had been discussed with Colon, Blue Cross, that if that was the case, they would go down to the union and they would tell the union that they wanted out, that they didn't want to be members of the union, and that was the express purpose of their leaving my place, our place at 12:00 o'clock that afternoon, to tell Pagan and Passman that they didn't want to be in the union.

Q. What date was this? A. The 29th of March, a Friday.

Q. Right. And you spoke -- you said this to Vega and Colon during that day? A. I didn't tell them that. That was the express purpose upon their leaving, that they would go down and tell the union. I never pushed them. They are free souls just as they went to the union to join, they were going to the union to tell them that they didn't want to become members.

221 Q. To be specific, didn't you ask them this. And listen carefully. I asked if they were willing to accept what I spoke of, willing to work with me and trust me, for them to go down and tell the union they changed their minds and didn't want the union anymore, didn't you say that? A. Word for word, I couldn't -- I wouldn't say yes I wouldn't say no.

JUDGE GOLDBERG: Did you say it in substance?

THE WITNESS: In substance if I didn't say it, it was certainly intended. If it wasn't intended, it certainly was meant. The meaning was there, the intention was there. Whether it was exactly what I had said, I can't -- you know --

Q. Didn't you also say to them that if you were assured that the union was dropping the filing of the petition, that Passman mentioned he was filing, that you would immediately put them into the hospitalization plan? A. I couldn't immediately put them into a hospitalization plan.

JUDGE GOLDBERG: That wasn't the question.

Q. I didn't ask that question. A. No --

JUDGE GOLDBERG: Did you tell them that?

THE WITNESS: If I told them anything like that, it would have to have been with a direct reference to a July first anniversary date.

222 Q. Immediately put them into the hospitalization plan?

A. No.

Q. You didn't tell them that? A. I never did and I never would.

Q. All right.

And this was approximately just before lunch, in the morning you were discussing this with them, were you not? A. Yes.

Q. And they said they can go during lunch break to the union to tell the union to forget the shop? A. That's right.

Q. And they left at noon and came back to work later that day? A. Yes.

Q. And you asked them what happened? A. That's right.

Q. What did they say? A. Colon said don't worry, it's been taken care of.

Q. That was Friday, March 29th, right? A. Right.

Q. April first you made a call to Mr. Passman? A. That's right.

Q. What was the reason of calling him? A. I didn't get a letter which was requested.

223 Q. You had requested a letter of Passman? A. I had asked Colon and Vega to have Mr. Passman send me a letter stating that this filing that he had made meaning of Thursday was being dropped and that the two boys had cancelled the union.

Q. Mr. Passman told you that it was too late, he had already filed and if they didn't want the union they could vote against the union, is that the substance of the conversation? A. Right.

Q. Did you tell any of this up to this point to either your father-in-law or your brother-in-law? A. My brother-in-law.

Q. How about your father-in-law? A. No.

Q. When did he first become aware that there was a union trying to organize his employees? A. At about the same time that I did, the end of February, when I gave him Mr. Passman's card.

Q. But I believe you stated on direct examination he didn't do anything about it? A. That's right.

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225 Q. On April 4th, after you received the petition, you were surprised, were you not? A. Yes.

Q. And you were annoyed? A. Yes.

Q. After Mr. Colon came in, you mentioned this was going to cost you a lot of money, hiring lawyers, you were annoyed? A. Yes.

226 Q. I believe you stated during that conversation eventually you asked them if they wanted a union and both Colon and Vega said they did and you told them they were fired, correct? A. I don't recall if I asked Colon whether he wanted a union or not. I asked Vega that question. I think it came out more towards -- in my anger at the moment in my conversation with Colon, I had made reference to the fact that this hadn't been filed, as Passman said on Monday, it had been filed on Wednesday in fact, and that if what he had said, that it was all being taken care of was actually in fact taken care of, none of this would have come about, and now that it is here, it is going to cost us thousands of dollars in legal fees and time.

And in my anger I had raised my voice, which I think is normal. At that time he smashed his hand down on the desk and said, I don't give a shit, I want the union.

And then that's when I fired him.

* * * * *

262 MR. TRUNKES: Your Honor, at this point, I would like to introduce into evidence, Mr. Zell's affidavit submitted to the Board that has been marked General Counsel's Exhibit 5.

* * * * *

265 JUDGE GOLDBERG: Mr. Horowitz, those portions have been offered in evidence, I'm asking you for your position as to that offer of evidence.

MR. HOROWITZ: I would object as being isolated from a context which would make it less than fair to take anything other than the whole exhibit, let it speak for itself, whatever its effect.

266 JUDGE GOLDBERG: That is the correct position under the circumstances.

The document in its entirety will be received.

I warn both counsel that it is being received only -- first of all, it is being received primarily for the statements that Mr. Trunkes has read which contradict, appear to contradict the testimony of the witness.

The balance of the statement is received to throw light on those portions that Mr. Trunkes has read.

There is nothing in that affidavit at this point that is being received as substantive evidence unless my attention is called to it and we have it argued out.

I'm not foreclosing that possibility, this is an interested party.

* * *

* * * * *

320 MR. TRUNKES: Before I start the oral argument, I would like to make a motion.

I would like to make a motion to amend the complaint to include an 8(a)(1) allegation, that Mr. Zell promised hospitalization benefits providing that the union employees abandon union District 65. ***

* * * * *

321 MR. TRUNKES: *** Have you a position on the subject, Mr. Horowitz?

MR. HOROWITZ: Yes, for one thing they were, that is insofar as the complaint serves as notice of what one is to defend, there was ample opportunity in the issuance of the complaint, when they had all of the statements, to have made the motion.

There was also a matter in the answer relative to conversations and promises.

JUDGE GOLDBERG: Where is that in the answer, Mr. Horowitz?

14 says while there has been some discussion, notably about wage increases and medical benefit insurance considerably before the appearance of District 65 on the scene.

I don't think it is necessary to read the balance of paragraph 14.

322 It seems to me, Mr. Horowitz, that you have made the strongest argument I have heard so far for granting the motion.

In other words, you knew that this conversation was relevant to the case. The material came out in the usual course of examination. From time to time, as a matter of fact, the witness Zell volunteered information.

Will you please show me how you will be prejudiced by permitting the complaint to be amended to include this matter, and how you would have met it had it been in the complaint differently than the way you have met it.

In other words, I'm looking for real prejudice because it seems to me that the matter was gone into pretty fully, and you know the rule, that where a matter is completely litigated, a finding may be based upon it, notwithstanding the failure of the complaint to contain it.

I'm now simply putting to you the question of how you have been prejudiced, how you would be prejudiced if I were to grant this motion.

MR. HOROWITZ: Let me put it this way as a preliminary. What I alleged was ostensibly -- let me put it this way.

323 I subscribed to a theory of let's call it truthfulness in pleading where we have sinned, we sinned. In effect I'm trying to show mitigation. I'm also trying to gain credibility for my side by admissions against interest where nothing in the truth --

JUDGE GOLDBERG: Your answer is notable for that, and I don't disagree with you. But I want you to tell me how you would be prejudiced by an amendment at this time of the complaint to include that allegation, what you could have done or would have done to meet it that you were not afforded an opportunity to do.

MR. HOROWITZ: What I leaned on was an allegation of the complaint that had been denied by us for various reasons, and that allegation happened to be, I believe it was 7A of the complaint. To the effect that there was an invitation on the part of Colon and Vega to offer benefits, and in a sense as the testimony elicited is so. The Union was used as a lever to see what they could get from the employer.

In a sense it is a defense to an 8(a)(1) by saying this is a continuation of a course of private bargaining.

* * * * *

325 JUDGE GOLDBERG: * * * Since the taking of testimony is closed, Mr. Trunkes, I think I can safely reserve judgment on your motion.

If I grant it, and if I find the evidence supports it, I'll explain it in my decision and make a finding.

* * * * *

327 MR. TRUNKES: I'm ready to give my oral argument.

* * * * *

JUDGE GOLDBERG: Proceed.

* * * * *

334 MR. TRUNKES: * * * It is the General Counsel's contention that Vega was laid off indefinitely by the respondent in order to

dissipate the union's majority in violation of Section 8(a)(3) of the Act.

* * * * *

338 Now, as you are aware, your Honor, during a representation hearing, the region is precluded from introducing any evidence of unfair labor practices, and the only evidence we have here pertaining to Mr. Vega is the fact that he was laid off indefinitely for economic reasons, as testified to by Mr. Zell. There was nothing the union could do at the representation hearing to counteract that.

As a result, the Regional Director did find that Mr. Vega was not to be included in the unit for voting purposes.

Under those arrangements, it is obvious that if two employees went to the polls, one employee, Mr. Colon, in all probability would vote for the union, and the other employee, who was never

339 contacted by the union, who was an office clerical employee, should possibly not even be in the union, the union, of course, had no hopes of obtaining that employee's vote.

Therefore, an election with those two employees, had it taken place, would have been an act of futility on the union's part as they undoubtedly would not have been successful.

It was following that that the union did, of course, file the instant charges.

Now, I think the facts have been pretty much substantiated by General Counsel through its witnesses. I don't think the evidence submitted by respondent is sufficient to preclude a finding of a dismissal of the charges.

Regarding Mr. Vega's discharge, the Board has often stated that a protectual discharge is the basis for finding an 8(a)(3) violation. * * *

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345 MR. HOROWITZ: Orally, I want to concentrate on high-
lights.

* * * * *

346 With all the statements that we have heard as to why this
union is entitled to a bargaining order without more, there is the
interest of an office clerical employee to have a vote in her
representation.

JUDGE GOLDBERG: I meant to ask you how would you pro-
pose to conduct what you call a globe election with one employee,
Mr. Horowitz?

MR. HOROWITZ: Can not.

JUDGE GOLDBERG: Wouldn't that take care of it?
Off the record.

(Discussion off the record.)

JUDGE GOLDBERG: Proceed, Mr. Horowitz.

MR. HOROWITZ: You were saying, your Honor, with respect
to globe elections, and the point that I made in the answer, and in
a bit of an opening argument --

JUDGE GOLDBERG: I simply point out that it isn't possible
to run a globe election, and I doubt very much that the circumstances
here are anywhere like the circumstances in the ordinary situation
that is commonly called globing.

In addition to that, I think you have specifically conceded the
appropriateness of an all employee unit. Not only in the representa-
tion case, but affirmatively in this case, and I don't know that it

347 would do much good to spend much time on that aspect of the
case.

MR. HOROWITZ: I would say that my feeling, looking ahead
in terms of the greater principles of Gissell, is that when the peti-
tion was filed, I'm quite sure that had the situation at the time of the

hearing been one where there was one office clerical employee, and two warehouse employees, that it would be a proper occasion to request a globing of the office clerical employee as to her wishes expressed in a secret ballot as to whether to be included in the unit or not included in the unit.

The situation as it presented itself at the time of the hearing where respondent here, the employer's position was that in accordance with the petition, they were anxious to comply, that there was a legitimate question concerning representation, and the given situation then was such that under another representation rule, to the effect that you cannot vote a one person unit, made it such that the same affect would be achieved by -- in other words, to insist on a globing at that point, would mean that you were making a move for a dismissal of a representation petition, a one man unit.

JUDGE GOLDBERG: All I can see is you thought you could at that time -- at that time, you thought you could win without it, without the globe situation.

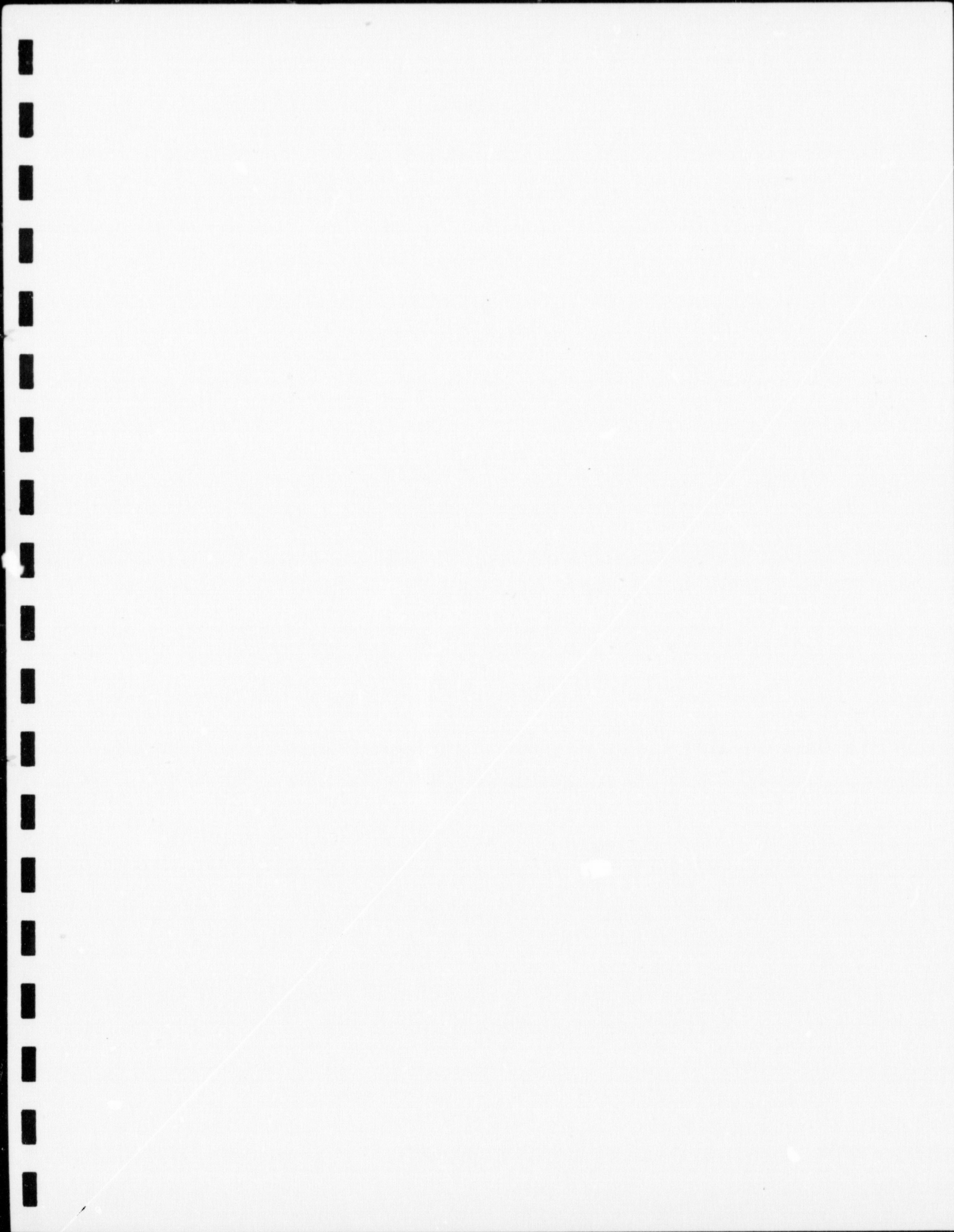
348 MR. HOROWITZ: No.

JUDGE GOLDBERG: I didn't mean to start an argument. I think it would be better for you to make your argument.

MR. HOROWITZ: We don't presume to own anyone's inner thoughts or consciousness in points that were made in the Gissell case between cards and a vote in a ballot box; the ballot is still the preferable thing.

The point that I am making, and I think it is a point that is worthwhile, is that this person who was an office clerical is being here attempted in the guise of a bargaining order to be done out of a vote on her destiny.

JUDGE GOLDBERG: I think you better brief that on the law. I know how you feel in your own personal reactions, or perhaps your client does, but this is much more intricate, and I suggest that you brief it.



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352 MR. HOROWITZ: * * * That was another fact that I bring out. That with all of this awareness, and all of these claims that are made later, the union participates in a representation petition after all these acts are alleged to have been committed.

JUDGE GOLDBERG: What was the date of that representation hearing?

MR. TRUNKES: April 17.

MR. HOROWITZ: And went on to an order directing election.

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